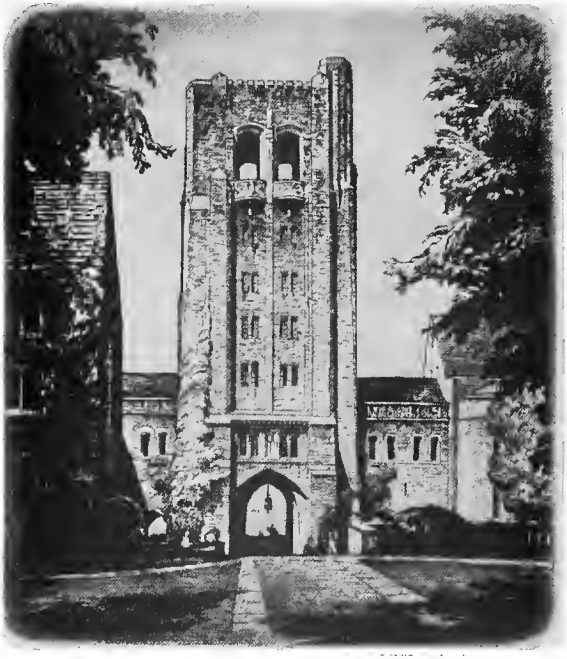

OUTLINE

OF THE

LAW OF TRUSTS

PREPARED FOR THE USE OF STUDENTS

BY

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NOTE TO FIRST EDITION.

This outline is designed for the use of the students of the Brooklyn Law School. It is intended to serve mainly as a guide to the reading of cases, and is in no sense a treatise on the subject. It lacks both the fullness of treatment and original research necessary to such a work. It follows to a considerable extent the lines of two works, Ames' Cases on Trusts and Reeves on Real Property, from both of which many valuable suggestions and ideas have been drawn. In Article III. the plan of the former work has been adopted, and in Articles VIII., IX. and X. it has been followed very closely, the heads and sub-heads having been quoted therefrom as indicated. I am also indebted to the same work for many of the cases cited. Reeves on Real Property has been largely followed in the discussion of express trusts for special purposes, and constructive trusts. Much assistance has also been received from Perry on Trusts, Lewin on Trusts, and the American and English Encyclopedia of Law.

The use made of the works of Professor Ames and Professor Reeves, as above stated, has been by their permission, and my thanks are hereby extended for the help thus afforded.

G. I. W.

NOTE TO SECOND EDITION.

This edition follows substantially the lines of the first edition; but in some instances the arrangement of topics has been changed, the text has been revised to some extent, and numerous cases have been added.

G. I. W.

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OUTLINE OF THE LAW OF TRUSTS.

I.

ORIGIN AND HISTORY OF TRUSTS.

Modern trusts are for the most part an outgrowth of the practice of enfeoffing to uses which prevailed in England in mediæval times.

Uses. The use was defined by Lord Coke as follows:

> "An use is a trust or confidence reposed in some other, which is not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, *scilicet*, that *cesty que use* shall take the profit, and that the terre-tenant shall make an estate according to his direction. So as *cesty que use* had neither *jus in re*, nor *jus ad rem*, but only a confidence and trust, for which he had no remedy by the common law, but for breach of trust his remedy was only by subpœna in Chancery." 2 Coke upon Littleton, by J. H. Thomas, Chap. XLIII, *570.

For a history of the origin and development of uses in England, see, Digby's History of the Law of Real Property, Ch. VI., pp. 315-343; 1 Reeves on Real Property, Secs. 294-301; 1 Perry on Trusts, Secs. 1-4; 1 Lewin on Trusts, *1-6; 2 Coke upon Littleton, by Thomas, *570, Note A; Burgess v. Wheat, 1 Eden, 177, 217-227.

Writers are divided as to whether the *fidei commissa* of the Roman law played any part in the development or enforcement of the use. See, Digby's History of the Law of Real Property, Perry on Trusts, and Lewin on Trusts, *supra*, also Bispham's Principles of Equity, Sec. 50; McDonough's Exrs. v. Murdoch, 15 How. (U. S.), 367.

The use was not recognized by the common law courts, but only in Chancery. Anon., Y. B., 4 Edw. IV., fol. 7, pl. 9 (A. D. 1464), Ames' Cases on Trusts, 240; Anon., Y. B., 15 Hy. VII., fol. 13, pl. 1 (A. D. 1499), Id., 251.

If the feoffee to uses enfeoffed another, no subpœna could at first be had against the second feoffee, but this was later confined to those who took for value and without notice. *Note.* Fitzherbert's Abgt., title Subpœna, pl. 19 (A. D. 1453), Ames' Cases on Trusts, 282, and note; Anon., Y. B., 14 Hy. VIII., fol. 4, pl. 5 (A. D. 1522), Id., 283; *Note.* Brooke's New Cases, March's Translation, 95 (A. D. 1538), Id., 285, and note.

So also no subpœna could at first be had against the heir of the feoffee to uses, but this was afterward reformed. Anon., Y. B., 8 Edw. IV., fol. 6, pl. 1 (A. D. 1468), Ames' Cases on Trusts, 345, and note; Weston v. Danvers, Tothill, 105 (A. D. 1584), Id., 346, and note.

No subpœna could be had against a disseisor nor against a tenant in dower or by the curtesy of the feoffee to uses. Lord Compton's Case, 3 Leonard, 196 (A. D. 1580), Ames' Cases on Trusts, 370; Chuddleigh's Case, 1 Coke's Rep., 120a, 139b, Id., 373, Note, "Uses." See also Ames' Cases on Trusts, 374, Note "Uses."

The interest of the *cestui que use* descended to his heirs in like manner as a legal estate. Anon., Y. B., 5 Edw. IV., fol. 7, pl. 16 (A. D. 1465), Ames' Cases on Trusts, 351, and notes.

Such interest was alienable by the *cestui que use.*

The duties of the feoffee to uses were generally to permit the *cestui que use* to take the profits, to make an estate as directed by him, and to re-enter or bring a proper action to recover possession in case he (the feoffee) should be disseised. Coke upon Littleton, *supra.*

The feoffee might, however, have active duties to perform; for an instance see Case in the Reign of Henry VII., 2 Sugden on Powers, Appendix 1, *510. In such case the legal relationship was known as a trust.

Uses might be created in both real and personal property. 1 Lewin on Trusts, *4.

The Statute of Uses. The purpose of this statute (27 Hy. VIII., Ch. 10; A. D. 1535) was to put an end to the practice of enfeoffing to uses, and the enforcement thereof, by vesting the legal title in the *cestui que use.* Digby's History of the

Law of Real Property, Ch. VII., pp. 344-354; 1 Reeves on Real Property, Sec. 302.

Construction of the Statute. As the statute was construed by the common law judges it was practically rendered nugatory, so far as its purpose of abolishing uses was concerned. It was held that where one use was created upon another, as where A enfeoffed B, to the use of C, to the use of D, the legal title was vested in C, and the statute did not execute the second use. 1 Reeves on Real Property, Sec. 303; Tyrrel's Case, Dyer, 155a (about A. D. 1557-8), Digby's History of the Law of Real Property, 375; Girland v. Sharp, Cro. Eliz., 382 (about A. D. 1595), Id., 375.

Chancery after a time seized hold of this second use and began to enforce it under the name of a trust. Lady Whetstone v. Sts. Bury, 2 P. Wms., 146 (A. D. 1723); Hopkins v. Hopkins, 1 Atk., 581 (A. D. 1738).

Active uses were held not to be executed by the statute, and were enforced in Chancery. Nevill v. Saunders, 1 Vern., 415 (A. D. 1686), Digby's History of the Law of Real Property, 376.

Uses in personalty including leaseholds were held not to be executed, and were enforced in Chancery. 1 Perry on Trusts, Sec. 6; 1 Lewin on Trusts, *6.

An interesting discussion of the effect of the Statute of Uses will be found in "Tyrrel's Case and Modern Trusts," by Prof. James B. Ames, 4 Green Bag, 81, in which the writer reaches conclusions somewhat at variance with the generally received views.

Development of Trusts. Thus modern trusts were developed by Chancery from the uses held not to be executed by the Statute of Uses. For a history of this development, see, Digby's History of the Law of Real Property, pp. 368-374; 1 Reeves on Real Property, Sec. 304; 1 Perry on Trusts, Secs. 7-12; 1 Lewin on Trusts, *6-12; 2 Coke upon Littleton, by Thomas, *590, Note C.

Trusts Recognized by Common Law. There is a certain class of trusts which were not developed by Chancery from uses, but have been enforced from early times by common law courts in the action of account, and sometimes, where the amount was fixed, in the action of debt. Such trusts may be described as trusts arising in general out of business transactions and relations. Early examples of such trusts and their enforcement will be found in the following cases: Anon., Y. B., 6 Hy. IV., fol. 7, pl. 33 (A. D. 1405), Ames' Cases on Trusts, 1, and notes; Paschall v. Keterich, Dyer, 151b, pl. 5 (A. D. 1557), Id., 2, and notes; Harris v. deBervoir, Cro. Jac., 687 (A. D. 1624), Id., 4; Farrington v. Lee, 2 Mod. Rep., 311 (A. D. 1667), Id., 6, and notes.

Trusts of this character will now also be enforced in equity. Ames' Cases on Trusts, p. 1, Note 3.

II.

DEFINITION AND ELEMENTS.

Lord Coke's definition of a use (*supra*) has sometimes been adopted as the definition of a trust. 1 Perry on Trusts, Secs. 13-17.

A definition more in accord with modern ideas would seem to be as follows:

A trust is the legal relationship which exists where the legal title to property is held by one person, but he is under an obligation to apply that property in some way for the benefit of some other person.

This definition connotes four elements, viz: First, the trust property, also known as the subject of the trust. Second, the beneficiary, also known as the *cestui que trust*, or the object of the trust. Third, the trustee, who holds the legal title and whose duty it is to apply the subject to the object. Fourth, a separation of the elements of the ownership of property, the legal title being vested in one person, and the right of contemporaneous beneficial enjoyment being vested in another.

III.

TRUSTS DISTINGUISHED FROM OTHER LEGAL RELATIONSHIPS.

Other legal relationships are distinguished from trusts by the absence of one or more of the elements mentioned in the preceding article.

A. Trust and Debt Distinguished.

A debt is distinguished from a trust by the absence of the element known as the subject or trust property. The obligation of a trustee attaches to some definite property or fund, while a debtor is liable to pay out of his general property. To constitute a trust there must be distinct property or a distinct fund which the person claimed to be a trustee is under a duty to preserve separate and apart from his own money or property, and eventually to account for. If there be no such fund or property, but merely a general obligation to pay a sum of money, then there is no trust, but only a debt. Tucker v. Linn, 57 At. Rep. (N. J.), 1017.

Of course, the fact that a trustee has mingled trust property with his own, in violation of his duty, so that there is not in fact any separate fund or property, will not destroy the trust, if the trust property can be traced. It is not what the person obligated actually does, but what it is his duty to do, which determines whether the relationship is that of trustee and *cestui que trust* or that of debtor and creditor.

Three important consequences flow from the distinction herein made. (1) If trust property is lost or destroyed without fault on the part of the trustee, the trustee is not liable therefor. A debtor, on the other hand, remains liable for the debt, notwithstanding the loss or destruction, without his fault, of all his property. (2) If the trustee be insolvent, the beneficiary is entitled to preferential payment out of his assets to the extent that he can show that the same have been swelled by the trust property, while a general creditor is entitled only to his *pro rata* share. (3) The statute of limitations begins to run in favor of a debtor when the obligation matures. It does

not begin to run in favor of a trustee until he openly repudiates the trust.

The transactions to be considered to determine whether they give rise to trusts or debts may be divided into three classes, as follows:

1. Where money is paid to one for the use of another.
2. Where money is paid or property transferred by one to another for a specific purpose.
3. Where one appropriates his own money or property for a specific purpose for the benefit of another.

1. Money Paid to One for the Use of Another.

Agents. Money collected for premiums by the general agent of an insurance company constitutes a trust fund. National Bank v. Insurance Co., 104 U. S., 54; Dillon v. Connecticut Mutual Life Ins. Co., 44 Md., 386.

So do moneys received by a factor from the sale of principal's goods. Union Stock Yards Bank v. Gillespie, 137 U. S., 411; Baker v. N. Y. National Exchange Bank, 100 N. Y., 31; Wallace v. Castle, 14 Hun, 106, Ames' Cases on Trusts, 25.

An attorney who has collected money for his client has been held not to be a trustee so as to be liable in an action for conversion. Jackson v. Moore, 72 App. Div., 217.

Bank Collecting Commercial Paper. Where commercial paper is sent to a bank for collection, the collecting bank holds the same as agent for the owner and hence as a trustee until collection. Scott v. Ocean Bank, 23 N. Y., 289; Bank of America v. Waydell, 103 App. Div., 25, affd., 187 N. Y., 115; Manufacturers' Bank v. Continental Bank, 148 Mass., 553; Hazlett v. Commercial National Bank, 132 Pa. St., 118; Bank of Sherman v. Weiss, 67 Tex., 331; Richardson v. N. O. Coffee Co., 102 Fed. Rep., 785.

Whether the proceeds of the paper when collected are held in trust by the collecting bank for the owner of the paper, or whether the collecting bank upon receiving the same becomes a debtor for the amount thereof, depends upon whether or not the collecting bank is under a duty to preserve such proceeds

separate and apart from its own moneys. Where there is an arrangement, either express, or implied from custom or course of dealing, whereby the collecting bank is entitled to retain the proceeds of collected paper for any period, long or short, and is to remit at a future time or at stated intervals, the universal custom of bankers raises the presumption, in the absence of an express agreement or express instructions to the contrary, that the collecting bank may mingle such proceeds with its own money and use them as its own until the time for remittance comes. Hence, in such case, the relationship of debtor and creditor arises as soon as the collecting bank receives the money. People v. City Bank of Rochester, 93 N. Y., 582; Commercial National Bank v. Armstrong, 148 U. S., 50; Marine Bank v. Fulton County Bank, 2 Wall., 252; National Butchers & Drovers' Bank v. Hubbell, 117 N. Y., 384; McCormick Harvesting Machine Co. v. Yankton Savings Bank, 15 S. D., 196; Hallam v. Tillinghast, 19 Wash., 20; Franklin County National Bank v. Beal, 49 Fed. Rep., 606; Philadelphia National Bank v. Dowd, 2 L. R. A., 480, 486.

Where, however, paper is sent to a bank for collection and immediate remittance, there is a conflict of authority as to whether the collecting bank is a trustee of the proceeds after it has received them, or is merely a debtor for the amount. On the one hand it is argued that the duty to remit immediately precludes the idea that the collecting bank has any right to use the proceeds or mingle them with its own money. On this theory it has been held in a number of such cases that the proceeds constituted trust funds, and, hence, that the owners of the paper were entitled to preferential payment out of the assets of the insolvent collecting bank, or, in other words, were entitled to follow the proceeds and reclaim them from the liquidator. Continental National Bank v. Weems, 69 Tex., 489*; People v. Bank of Dansville, 39 Hun, 187;

* It is proper to say, with respect to Continental National Bank v. Weems, cited in the text, that there was in that case an agreed statement of facts, which stipulated, among other things, that the paper was sent for collection with an understanding between the plaintiff and the collecting bank that the proceeds of the collected paper should be preserved by the latter as the property of the former and returned to it as such. The case seems generally to have been regarded, however, as an authority for the proposition to which it is cited.

Arnot v. Bingham, 55 Hun, 533 (but see Frank v. Bingham, 58 Hun, 580); People v. Merchants' Bank, 92 Hun, 159; Freiberg v. Stoddard, 161 Pa. St., 259; Piano Mfg. Co. v. Auld, 14 S. D., 512.

On the other hand it is argued that the universal custom of bankers under instructions to collect and remit immediately is to mingle the proceeds of the collected paper with their own money and remit by cashier's check or by draft; that the owner of the paper, in the absence of express instructions or an express agreement to the contrary or a previous course of dealing showing a contrary intent, must be deemed to have assented to this practice, and that, therefore, even in such a case the relation of debtor and creditor arises at once upon collection. First National Bank of Richmond v. Davis, 114 N. C., 343; Same v. Wilmington etc. R. R. Co., 77 Fed. Rep., 401; Union National Bank v. Citizens' National Bank, 153 Ind., 44.

The former doctrine seems to be supported by the weight of authority, but the latter is probably more closely in accord with the general practice of bankers.

An express agreement or express instructions with respect to the disposition of the proceeds of collected paper will determine, according to the principles already laid down, the relations of the parties in cases where any such feature is present, as will also a previous course of dealing between the parties differing from the usual custom.

The cases thus far considered have been those involving only two parties, the owner of the paper, whether a bank or an individual, and the collecting bank. We now come to those cases which involve three parties, the owner, the agent bank, sometimes called the transmitting bank, and the collecting bank, in this case a sub-agent. Taking up the class of cases already referred to where the arrangement between the owner and the agent bank contemplates the retention by the latter of the proceeds of collected paper for some period after collection, and in which, accordingly, the relation of debtor and creditor arises at once upon collection, as already explained,

it is held that in order that the relation of debtor and creditor shall arise, the proceeds must have been fully reduced to possession by the agent bank; and, hence, where the agent bank sends paper to a sub-agent bank for collection, the proceeds remain trust funds until actually paid to the agent bank or actually applied to the payment of its indebtedness to the sub-agent. It follows that, if the agent bank fails after the paper has been collected by the sub-agent but before the proceeds have been so paid over or applied, the owner of the paper is entitled to follow and reclaim such proceeds from the liquidator of the agent bank, if they have been paid over to him; or they may be reclaimed from the sub-agent bank, if they remain in its hands, subject to certain conditions stated below. Commercial National Bank v. Armstrong, 148 U. S., 50; Evansville Bank v. German American Bank, 155 U. S., 556; Importers and Traders' National Bank v. Peters, 123 N. Y., 272; Blair v. Hill, 50 App. Div., 33, affd., 165 N. Y., 672; Manufacturers' Bank v. Continental Bank, 148 Mass., 553; National Exchange Bank v. Beal, 50 Fed. Rep., 355. *Contra*, Reeves v. State Bank, 8 Ohio St., 465.

If the paper is endorsed for collection, or notice is otherwise given to the sub-agent bank that it is not the property of the agent bank, the sub-agent cannot retain the proceeds on account of any claim it has against the agent. Evansville Bank v. German-American Bank, 155 U. S., 556; Comm. Nat. Bank v. Hamilton Nat. Bank, 42 Fed. Rep., 880, Ames' Cases on Trusts, 15; Bank of Clark County v. Gilman, 81 Hun, 486; Bank of Sherman v. Weiss, 67 Tex., 331.

Where, however, the sub-agent bank has no notice but that the paper is the property of its immediate correspondent, it may apply the proceeds to the payment of even an antecedent debt due from the agent bank. Bank of Metropolis v. N. E. Bank, 1 How. (U. S.), 234, 6 Id., 212; Continental National Bank v. First National Bank, 36 So. Rep. (Miss.), 189. But not in jurisdictions where an antecedent debt is not such consideration as will make the transferee of commercial paper a *bona fide* holder. McBride v. Farmers' Bank, 26 N. Y., 450; Dickerson v. Wason, 47 N. Y., 439; Scott v. Ocean Bank, 23

N. Y., 289. The rule is the same in New York under the Negotiable Instruments Law, unless the antecedent obligation is extinguished by the transaction, or there is a new consideration. Bank of America v. Waydell, 187 N. Y., 115.

Where commercial paper is sent to an agent bank for collection, which sends it to a sub-agent bank, which collects it and fails before remitting, the agent is nevertheless liable to the owner for the amount, which is apparently holding the agent bank a debtor and seems to be in conflict with the theory of the cases which have held the money in the hands of a sub-agent still a trust fund. Briggs v. Central National Bank, 89 N. Y., 182; Mackersy v. Ramsays, Bonars & Co., 9 Cl. & F., 818, Ames' Cases on Trusts, 13, and notes. But see, Indig v. National City Bank, 80 N. Y., 100, 105.

Where a check was sent to the bank on which it was drawn, charged to the drawer's account, and surrendered, but the bank failed before the draft by which remittance had been attempted was paid, it was held that the relation was that of debtor and creditor. People v. M. & M. Bank of Troy, 78 N. Y., 269.

2. Money Paid or Property Transferred by One to Another for a Specific Purpose.

To Take Up Negotiable Paper. A deposit of money to take up negotiable paper has sometimes been held to give rise to the relation of debtor and creditor. *Ex parte* Broad, 13 Q. B. D., 740, Ames' Cases on Trusts, 19; *In re* Barned's Banking Co., 39 L. J. Ch., 635, Id., 42. In other instances the relation of trustee and *cestui que trust* has been held to arise. People v. City Bank of Rochester, 96 N. Y., 32; Peak v. Ellicott, 30 Kan., 156; Rabel v. Griffin, 12 Daly, 241; Massey v. Fisher, 62 Fed. Rep., 958.

To Pay Debts, Expenses, etc. Where property was transferred by A to B, B promising to pay A's debt (which was a trust debt) to C, no trust attached to the property. Steele v. Clark, 77 Ill., 471, Ames' Cases on Trusts, 44.

Where bills of exchange were sent to an agent to meet expenditures and liabilities incurred by him on account of his principal, the agent was held to be a trustee of the surplus. Roca v. Byrne, 145 N. Y., 182.

Money sent by the vendee of merchandise to the vendor, in pursuance of a course of dealing, to pay transportation charges thereon has been held to be a trust fund in the vendor's hands. Michigan Steamship Co. v. Thornton, 136 Fed. Rep., 134.

For Investment. Money placed in the hands of another for investment is usually a trust fund. Merino v. Munoz, 5 App. Div., 71; Harrison v. Smith, 83 Mo., 210; Matter of Cavin v. Gleason, 105 N. Y., 256. But see, Pittsburgh Nat. Bank of Commerce v. McMurray, 98 Pa. St., 538, Ames' Cases on Trusts, 30.

To Secure Advances. Money deposited to secure advances is a debt. Butler v. Sprague, 66 N. Y., 392.

Effect of Agreement to Pay Interest. An agreement to pay interest usually constitutes the depositee a debtor. *Ex parte* Broad, *supra*; Pittsburgh Nat. Bank of Commerce v. McMurray, *supra*; Butler v. Sprague, *supra*. But in some cases it has not had this effect. Hamer v. Sidway, 124 N. Y., 538, Ames' Cases on Trusts, 33; Gutch v. Fosdick, 48 N. J. Eq., 353.

3. Appropriation.

If a debtor appropriates or sets apart from his other property certain money or property for the satisfaction of his obligation, he becomes thereby a trustee of the money or property so set apart or appropriated, so long as it remains in his hands. Farley v. Turner, 26 L. J. Ch., 710, Ames' Cases on Trusts, 40, as explained by the case of *In re* Barned's Banking Co., 39 L. J. Ch., 635, Id., 42; Hamer v. Sidway, 124 N. Y., 538, Id., 33; Matter of LeBlanc, 14 Hun, 8.

B. Trust and Bailment Distinguished.

A bailment is distinguished from a trust by the absence of the element of division of ownership. The legal title is not conferred upon the bailee, but remains in the bailor; and merely the right of possession is given to the bailee. In a trust the trustee has the legal title and generally the right of possession also. From this it follows that the obligation of the bailee is to return the subject of the bailment in specie, that is *the identical articles or material*, though it may be in an altered form, while the obligation of a trustee is not to render the identical property which comes into his hands, but to account for the same. Having title, he may entirely change its character, may sell it, or invest it in various ways, but at the termination of the trust he must account for all he has received. The following cases illustrate the distinction: Anon., Y. B., 12 & 13 Edw. III., 244, Ames' Cases on Trusts, 52; Ashley v. Denton, 1 Litt. (Ky.), 86, Id. 52.

C. Trust and Equitable Charge Distinguished.

An equitable charge exists where an obligation is imposed upon a person to whom property is given to make a payment to another person as a condition of accepting the same, as where A gives land to B upon condition that B shall pay C a definite sum or an annuity. The obligation is primarily the personal obligation of B, and the property is merely security in equity for its performance. The obligation may be absolute, or it may be conditional upon the property being sufficient to satisfy the charge. Subject to making the payment the property belongs absolutely to B. Thus, such a legal relationship lacks the element of division of ownership. Hodge v. Churchward, 16 Sim., 71, Ames' Cases on Trusts, 55; Jacquet v. Jacquet, 27 Beav., 332, Id., 56; Loder v. Hatfield, 71 N. Y., 92, 97, 102-4; 19 Am. & Eng. Encyc. of Law, 2nd Ed., 1342, 1365.

D. Trust and Executorship Distinguished.

An executorship lacks the element of division of ownership. The obligation of an executor is strictly fiduciary, and attaches

to particular property, but the whole title is vested in him until such time as he turns the property over to those entitled to receive it; that is, no right of contemporaneous beneficial enjoyment is vested in any other person. As the executor has, himself, no right of beneficial enjoyment, that element of ownership would seem to be in suspension during the continuance of an executorship, properly so called.

This distinction may be said to result from the nature of the duties to be performed. The duties of an executor are limited to closing up the estate of the testator; i. e., collecting assets, paying debts and expenses, and distributing the residue. If additional duties are imposed on executors they are to that extent trustees. Scott v. Jones, 4 Clk. & F., 382, Ames' Cases on Trusts, 70; *In re* Smith, 42 Ch. D., 302, Id., 72; Codman v. Brigham, 187 Mass., 309, 312; Bean v. Commonwealth, 186 Mass., 348. They will not, however, be entitled to double compensation unless their duties as executors and trustees are severable under the will and to be successively performed, and further unless they have at least substantially concluded their duties as executors and actually entered upon the performance of their duties as trustees, either with respect to the whole estate or that portion thereof devoted to the trust. Drake v. Price, 5 N. Y., 430, Ames' Cases on Trusts, 74; Hurlburt v. Durant, 88 N. Y., 121; Johnson v. Lawrence, 95 N. Y., 154; McAlpine v. Potter, 126 N. Y., 285, 289-90; Everson v. Pitney, 40 N. J. Eq., 539.

IV.

ELEMENTS OF A TRUST CONSIDERED.

A. The Subject or Trust Property.

In General. In general any property which is capable of being legally transferred may be made the subject of a trust. 1 Perry on Trusts, Sections 67-69. But not a mere direction that a certain solicitor be employed, nor a request that two persons live together. Foster v. Elsley, 19 Ch. D., 518, Ames' Cases on Trusts, 191, but see notes; Graves v. Graves, 13 Ir. Ch. Rep., 182, Id., 192.

A secret process may be the subject of a trust. Vulcan Detinning Co. v. American Can Co., 67 At. Rep. (N. J.), 339.

B. The Object or Cestui que Trust.

In General. The object of a trust must be carefully distinguished from its purpose. The word, as properly used, means the person to whose benefit the trust property is to be applied, while the word purpose indicates the end to be attained by such application. In general, any person who can take the legal title to property may be the beneficiary of a trust. 1 Perry on Trusts, Sec. 60.

Definite Object Necessary. In general every trust must have a certain and definite object, or one that can be ascertained by the ordinary rules of judicial construction, capable of enforcing the trust. Morice v. The Bishop of Durham, 10 Ves., 522, Ames' Cases on Trusts, 195; Holland v. Alcock, 108 N. Y., 312-324; Minot v. Attorney General, 189 Mass., 176, 180; Prichard v. Thompson, 95 N. Y., 76; Read v. Williams, 125 N. Y., 560, 567-570; Fairchild v. Edson, 154 N. Y., 199, 210-212.

The trustees may be empowered to select from a designated class the individuals to be benefitted, and if the class is not too large the trust will be valid; and in case of failure of the trustees to select, the property will be divided equally among the members of the class on the maxim, "equality is equity." Power v. Cassidy, 79 N. Y., 602, 608-613.

But if the class is too large so that the trust could not be enforced in case of failure of the trustees to make a selection, it will be void. Read v. Williams, *supra*; Fairchild v. Edson, *supra.*

To the rule requiring a definite beneficiary, there is a great exception in the case of charitable trusts, to be considered below, and in that connection will also be discussed the effect of the New York statute of charitable trusts, which supersedes the law in regard to charitable trusts as declared in Holland v. Alcock and other New York cases, *supra.*

Trusts Without a Beneficiary. There are certain cases in which trusts without a beneficiary capable of enforcing the trust have been upheld and the trustees permitted to carry them out, if they were willing. Such are trusts to erect monuments, to take care of dogs and horses, to free slaves, to have masses said for the repose of souls, &c. Mussett v. Bingle, Weekly Notes (1876), 170, Ames' Cases on Trusts, 201; *In re* Dean, 41 Ch. D., 552, Id., 205; Ross v. Duncan, Freeman Ch. (Miss.), 587, Id., 212; Reichenbach v. Quinn, 21 L. R., Ir., 138, Id., 209.

This doctrine does not obtain in New York. Holland v. Alcock, 108 N. Y., 312.

A similar disposition of property, *inter vivos*, has been, however, upheld on the theory that it was not a trust but a contract. Gilman v. McArdle, 99 N. Y., 451.

And a gift to a charitable corporation limited to one or more of the purposes of such corporation, and with a provision that the corpus should be held in perpetuity and only the income used, would even before the statute of 1893 be supported as an absolute gift and not as a trust. Wetmore v. Parker, 52 N. Y., 450, 457-460; Bird v. Mirklee, 144 N. Y., 544. See also, Yale College's Appeal, 67 Conn., 237; Inglis v. Trustees of Sailor's Snug Harbor, 3 Pet., 99.

While dispositions of property to trustees without beneficiaries capable of enforcing the application of the property to the purpose intended are called trusts, I prefer not to consider

them as true trusts but as *quasi*-trusts, for it cannot be said that there is any object.

Who May Be Beneficiaries. For a general discussion of this subject see, 1 Perry on Trusts, Secs. 61-66.

A state may be the beneficiary of a trust. State v. Rusk, 23 Wis., 636. A corporation may be a beneficiary. Chamberlain v. Chamberlain, 43 N. Y., 424; Sheldon v. Chappell, 47 Hun, 59. But a corporation cannot take as beneficiary of a trust lands or property the legal title to which it has no power to take. Coleman v. S. R. Turnpike Road Co., 49 Cal., 517. Nor where an unlawful perpetuity is created, even though a direct gift to the corporation might be made with the same restrictions as to use. Adams v. Perry, 43 N. Y., 487, 497, *et seq.* A devise or bequest to trustees for a charitable purpose, with a direction to form a corporation will be valid as an executory devise or bequest to the corporation, even where the English doctrine of charitable trusts does not obtain. Inglis v. Trustees of Sailor's Snug Harbor, 3 Pet., 99; Burrill v. Boardman, 43 N. Y., 254. But the direction to form a corporation must be absolute. Tilden v. Green, 130 N. Y., 29, 47.

An unincorporated association may be the beneficiary of a charitable or religious trust. White v. Rice, 112 Mich., 403; Second Cong. Soc. v. Waring, 24 Pick., 304. Some cases hold that such an association may be the beneficiary of a trust not charitable (the individual members being, of course, the *cestuis que trust*). Austin v. Shaw, 10 Allen (Mass.), 552; Salem etc. Mills Co. v. Stayton etc. Co., 33 Fed. Rep., 146, 153. But in New York a different rule obtains. Murray v. Miller, 178 N. Y., 316; Downing v. Marshall, 23 N. Y., at p. 382; Pratt v. R. C. Orphan Asylum, 20 App. Div., 352. But see, King v. Townshend, 141 N. Y., 358.

An alien can have no greater right to take as the beneficiary of a trust in real property than he has to take directly. Leggett v. Dubois, 5 Paige's Ch., 114. But where a conversion into personalty is contemplated at the creation of the trust, an alien may be the beneficiary. Anstice v. Brown, 6 Paige's Ch., 448. By the New York Revised Statutes (1 R. S. 729,

Sec. 60) it was provided that the trustee took the whole estate "both in law and in equity," and that the beneficiary took no estate, but could enforce the performance of the trust in equity. Under this statute it was held that an alien might be the beneficiary of a trust to receive and pay over the rents and profits of real property, because he acquired no interest in the property itself. Marx v. McGlynn, 88 N. Y., 357, 376. This may not be true under the present statute, which provides in substance that the trustee is vested with the *legal* estate, and that the beneficiary does not take any *legal* estate or interest in the property. Real Property Law, Sec. 100.

C. The Trustee.

Trust Not to Fail For Want of Trustee. The fundamental rule with respect to the trustee is that a trust otherwise valid will not be permitted to fail for want of a trustee, but a court of equity will supply any vacancy by appointing a new trustee or by taking upon itself the execution of the trust. Dodkin v. Brunt, L. R., 6 Eq., 580, Ames' Cases on Trusts, 226; Adams v. Adams, 21 Wall., 185, Id., 227; Dailey v. New Haven, 60 Conn., 314, 324; Treat's Appeal, 30 Id., 113; Sheldon v. Chappell, 47 Hun, at p. 63.

It is sometimes held that a personal discretion vested in the trustee named by the person creating the trust cannot be exercised by a substituted trustee; and thus the death, resignation or refusal to act of the trustee named may in some instances result in the failure of the trust. Benedict v. Dunning, 110 App. Div., 303.

The rule that a trust will never be permitted to fail for want of a trustee is not always true as applied to charitable trusts, there being some cases where, if there are no trustees who are willing and able to act, the trust will fail. 1 Reeves on Real Property, Sec. 346. This point will be more fully considered below.

Who May Be Trustee. For a general discussion of this subject see, 1 Perry on Trusts, Secs. 38-59; 1 Lewin on Trusts, *30.

The sovereign, including the United States, and any state, may be a trustee, but the trust cannot be enforced for the sovereign is not subject to be sued. Pimbe's Case, Moore, 196, Ames' Cases on Trusts, 215; Pawlett v. Atty. Gen., Hard., 465, Id., 367; Reeve v. Atty. Gen., 2 Atk., 223; Penn v. Lord Baltimore, 1 Ves. Sr., at p. 453; Briggs v. Light Boats, 11 Allen, 157; Yale College's Appeal, 67 Conn., 237, 245; Bedford v. Bedford's Admr., 99 Ky., 273, 290. *Contra*, both as to state and the United States. Levy v. Levy, 33 N. Y., 97, 122.

If a public officer is named as trustee by the title of his office, the person who is the incumbent of the office when the trust goes into effect will take. Inglis v. Trustees of Sailor's Snug Harbor, 3 Pet., 99, 114; Dunbar v. Soule, 129 Mass., 284.

The right of an alien to take title to real property as trustee is the same as his right to take title for his own benefit. If, however, the property reverts to the sovereign by reason of the alienage of the trustee, the rights of the *cestui que trust* will very generally be recognized. 1 Perry on Trusts, Sec. 55; Furguson v. Franklins, 6 Munf. (Va.), 305.

A non-resident may be a trustee. Roby v. Smith, 131 Ind., 342; Farmers' L. & T. Co. v. Chicago &c. Ry. Co., 27 Fed. Rep., 146; Shirk v. City of La Fayette, 52 Id., 857. But non-residence may be a ground for removal. *In re* Harrison's Trusts, 22 L. J. Ch. (N. S.), 69; S. C., 15 Eng. Law & Eq. Rep., 345.

A corporation may be a trustee when authorized by its charter, or when the trust is one in which the corporation has an interest by reason of its purpose being to carry out some purpose of the corporation, and this applies even to a municipal corporation. Atty. Gen. v. Landerfield, 9 Mod. Rep., 286, Ames' Cases on Trusts, 216, and notes; Green v. Rutherforth, 1 Ves. Sr., at p. 468; McDonough's Exrs. v. Murdoch, 15 How. (U. S.), 367; Perin v. Carey, 24 How. (U. S.), 465; Webb v. Neal, 5 Allen (Mass.), 575; Dublin Case, 38 N. H., at p. 577. But see, Dailey v. New Haven, 60 Conn., 314, 319; Fosdick v. Town of Hempstead, 125 N. Y., 581. One corporation may be trustee for another where the beneficiary is authorized by its charter to assist in carrying out the purposes of the trustee. Sheldon

v. Chappell, 47 Hun, 59; Chamberlain v. Chamberlain, 43 N. Y., 424. But see, Matter of Griffin, 45 App. Div., 102, reversed on other grounds, 167 N. Y., 71.

An unincorporated association may not be trustee, except perhaps of a charitable trust. Trustees v. Hart's Exrs., 4 Wheaton, 1, 27; Hart v. Hamberger, 1 N. Y. St. Rep., 293.

Persons *non sui juris*, as infants, married woman, &c., and even idiots and lunatics, may be trustees, subject, however, to their total or partial inability to execute the trust, by reason of their incapacity to perform legal acts. Still v. Ruby, 35 Pa. St., 373, Ames' Cases on Trusts, 219; People v. Webster, 10 Wend., 554; Jevon v. Bush, 1 Vern., 342, Ames' Cases on Trusts, 217, and notes; Sutphen v. Fowler, 9 Paige's Ch., 280.

A person cannot be trustee for himself, and when the legal and equitable estates vest in the same person the latter will merge in the former. Goodright v. Wells, Douglas, 771, Ames' Cases on Trusts, 445; Selby v. Alston, 3 Ves.,. 339; Rose v. Hatch, 125 N. Y., 427. In order that the legal and equitable estates shall merge they must be equal in quantity. Thus a legal estate in fee will not merge an equitable contingent remainder in tail. Philips v. Brydges, 3 Ves., 120. But where a beneficiary is sole trustee there will be a merger, although his beneficial interest is not to continue for the whole period of the trust, or does not embrace all of the trust estate, and such beneficiary will have a legal estate to the extent of his beneficial interest. Weeks v. Frankel, 197 N. Y., 304; Woodward v. James, 115 N. Y., 346, 357; Bolles v. State Trust Co., 27 N. J. Eq., 308. Legal and equitable estates in order to merge must be of the same quality. Where there are two or more trustees, they are usually joint tenants of the legal estate; and, if the same persons are beneficiaries, they are tenants in common of the equitable estate, and there will be no merger, provided there are other beneficiaries. Burbach v. Burbach, 217 Ill., 547. But if all the trustees are beneficiaries and all the beneficiaries are trustees, there will be a merger notwithstanding the difference in the quality of the estates. At least, this is true in New York. Greene v. Greene, 125 N. Y., 506. It has been held that a merger will not take place

where a contrary intention is evidenced. Earle v. Washburn, 7 Allen (Mass.), 95. A beneficiary may be one of two or more trustees, and may act in all matters except those in which his personal interest is concerned. Bundy v. Bundy, 38 N. Y., 410, 417; Rogers v. Rogers, 111 N. Y., 228; Robertson v. de Brulatour, 188 N. Y., 301, 317. And one to whom a portion of the income is given beneficially for life may be sole trustee of the corpus and the residue of the income. Woodward v. James, *supra.*

A court of equity may properly appoint one of a number of beneficiaries to be one of several trustees. *Ex parte* Conybeare's Settlement, 1 Wk. Rep., 458, Ames' Cases on Trusts, 222, and notes. It is highly improper, however, for a court to appoint a sole beneficiary as sole trustee, but to do so will not produce a merger of the legal and equitable estates. Losey v. Stanley, 147 N. Y., 560, 568.

V.

CLASSIFICATION.

Trusts are classified in various ways, but the most convenient way is according to the method of creation. On this basis they are divided into two classes, express trusts and implied trusts.

Express trusts are those created by the direct act of the parties, the intent being evidenced by spoken or written words.

Implied trusts are those raised by equity from the acts or situation of the parties, without an intent evidenced by words. These are divided into two classes, resulting trusts and constructive trusts.

Resulting trusts are those implied by equity from the acts of the parties according to their presumed intention.

Constructive trusts are those raised by equity to promote the ends of justice irrespective of the intention of the parties. 1 Perry on Trusts, Secs. 18-27.

VI.

EXPRESS TRUSTS.

A. Creation.

1. The Settlor.

Every express trust must be created by some person who is known as the settlor, although, if the trust be created by will, he is usually spoken of as the testator. Generally speaking any person who has power to transfer property directly may transfer it in trust. See generally on this subject, 1 Perry on Trusts, Secs. 28-37. Persons *non sui juris*, as married women, infants, etc., are generally incapacitated from creating trusts. Graham v. Long, 65 Pa., 383. The acts of an infant being merely voidable, a declaration of a trust made before coming of age may be ratified by subsequent acts. Ownes v. Ownes, 23 N. J. Eq., 60.

2. Method of Creation.

A trust may be created either by a transfer of property, by the owner thereof, to another, in trust for a third person, or by a declaration on the part of the owner that he holds the property in trust for another.

a. Sufficiency of Language.

In General. No particular form of words is necessary to create a trust, the words trust and trustee need not be used, but words must be used from which the court can see or infer an intention to create a trust, that is, to vest the legal title in one person to hold for the benefit of another. Whether the language is sufficient must be determined in each case according to the usual methods of construction. The following are instances of language held sufficient: Woodward v. James, 115 N. Y., 346; Mee v. Gordon, 187 N. Y., 400; Morse v. Morse, 85 N. Y.,. 53; Tobias v. Ketchum, 32 N. Y., 319; Sawyer v. Cook, 188 Mass., 163.

Precatory Expressions. The most difficult cases in which to determine whether a trust is intended arise in cases of precatory expressions in wills. These are words of expectation, recommendation, desire, hope or entreaty, that the legatee or devisee of property will apply it or some portion of it to some use other than his own benefit. The question to be determined is whether the words were intended to be imperative and control the discretion of the person addressed, or are merely precatory, and intended only to influence the discretion of such person. In this inquiry each case must stand by itself, and no very satisfactory rules can be laid down, nor can the adjudged cases be satisfactorily classified. The classification herein attempted, following in the main that of Prof. Ames, is probably the best that can be devised. It is based in part upon the rule laid down in Briggs v. Penny (3 MacN. & Gord., 546, 554), wherein it was said that precatory words would be deemed to import a trust on three conditions, "first, that they are so used as to exclude all option or discretion in the party who is to act as to his acting according to them or not; secondly, the subject must be certain, and thirdly, the objects must not be too vague or indefinite to be enforced." The courts, however, have not, in general, followed any particular rules, deciding each case on its own merits. The tendency of the more recent authorities is against holding such expressions imperative. The usual methods of construction are adopted, the whole instrument and surrounding circumstances being considered.

The following cases are instances of precatory expressions construed as imperative: Colton v. Colton, 127 U. S., 300; Phillips v. Phillips, 112 N. Y., 197; Collister v. Fassitt, 163 N. Y., 281; McCurdy v. McCallum, 186 Mass., 464; Blanchard v. Chapman, 22 Ill. App., 341; Noe v. Kern, 93 Mo., 367; Eberbart v. Perolin, 48 N. J. Eq., 592.

The following cases are instances where the intention was clear not to create a trust: Bacon v. Ransom, 139 Mass., 117; George v. George, 186 Mass., 75; Matter of Keleman, 126 N. Y., 73; Fairchild v. Edson, 154 N. Y., 199, 212-214.

It is a general rule that where an absolute devise or bequest is made to one, followed by words of inheritance or succession,

or words indicating that absolute control or right of disposition is intended to be conferred, such gift will not be limited nor cut down by any subsequent expression less clear and definite. Post v. Moore, 181 N. Y., 15; Clay v. Wood, 153 N. Y., 134; Clark v. Leupp, 88 N. Y., 228; Aldrich v. Aldrich, 172 Mass., 101.

Where the testator attempts to control the disposition of property not his own nor derived from him, the expression will be considered merely a request. Palmer v. Schribb, 2 Eq. Cas. Abgd., 291, pl. 9, Ames' Cases on Trusts, 77, and notes.

The following are instances where the subject was not defined, and it was held that there was no trust, though that reason was not always assigned: Rose v. Porter, 141 Mass., 309; Lawrence v. Cooke, 104 N. Y., 632; Sturgis v. Paine, 146 Mass., 354; Hughes v. Fitzgerald, 78 Conn., 4; Russell v. U. S. Trust Co., 136 Fed. Rep., 758.

The following are instances where the beneficiaries were indefinite, and it was held that there was not a trust: Stead v. Mellor, 5 Ch. D., 225, Ames' Cases on Trusts, 91, and notes; Giles v. Anslow, 128 Ill., 187.

Where a power of selection among individuals of a definite class is given to the person to whom the precatory expressions are addressed, trusts have in some instances been held to have been intended. Cox v. Wills, 49 N. J. Eq., 130, reversed on other grounds, Id., 573. But not in other instances. Foose v. Whitmore, 82 N. Y., 405; Davis v. Mailey, 134 Mass., 588.

Precatory trusts are not properly classified as implied trusts. A precatory trust is not based on the *acts* of the parties, but on the *language* of an instrument, considered by the court, after due interpretation, to express an intention to create a trrust. Such trusts are as truly express trusts as if the intent was plain without interpretation.

b. Transfer of Property.

Necessity. It is said that equity will not aid a volunteer. This means that equity will not declare a trust for the benefit of a volunteer, but if a trust is completely created equity will

enforce it, even at the instance of a volunteer. Ellison v. Ellison, 6 Ves., 656, 1 White & Tudor, *291; Van Cott v. Prentice, 104 N. Y., 45.

In the case of voluntary settlements the question whether a trust is completely created or the settlement otherwise completely effected becomes therefore important. There are three methods of effecting such a settlement; first, by direct gift or transfer to the donee, in which case the donor must do every act necessary to be done by him to divest himself of the legal title where that is possible and vest it in the donee; second, by transfer of title to a third person in trust for the donee, in which case a similar rule applies except that the title is to be vested in the trustee; and third, by the donor declaring himself a trustee for the donee, in which case he must do every act necessary to be done by him to divest himself of the beneficial interest and vest it in the donee. If a settlement is attempted in any one of the three ways indicated, and is not perfectly carried out, equity will not enforce it at the instance of a volunteer by resorting to one of the other methods, as, for example, if there is an attempt to create a trust in a third person for the benefit of a volunteer, and a failure to transfer the legal title to the trustee, equity will not declare the settlor a trustee. Milroy v. Lord, 4 DeG., F. & J., 264, Ames' Cases on Trusts, 149.

Where a direct gift is attempted, but fails for want of a sufficient transfer of the legal title, equity will not declare the donor a trustee. Richards v. Delbridge, L. R., 18 Eq., 11, Ames' Cases on Trusts, 130; Young v. Young, 80 N. Y., 422, 436.

The settlor may, however, declare himself a trustee for the beneficiary, in which case there is no necessity for a transfer of the legal title, which may remain in the settlor. Locke v. Farmers' Loan & Trust Co., 140 N. Y., 135, 141-143; *In re* Smith's Est., 144 Pa. St., 428.

When Settlement Perfected—Transfer of Title to Donee or Trustee. The question whether a settlement is perfected is a question of fact in each case. A few general rules are, however, deducible from the authorities. If the settlement is to

be effected by direct gift or transfer to a trustee, the settlor must, if he have the legal title to the property, and the property is capable of a legal transfer, do everything necessary to be done by him to effectually transfer the legal title to the donee or trustee. Space will not permit a detailed consideration of what is necessary to constitute a legal transfer of different kinds of property. The following cases are instances of transfers held sufficient: Adams v. Adams, 21 Wall., 185; Brown v. Spohr, 87 App. Div., 522, affd., 180 N. Y., 201; Peck v. Scofield, 186 Mass., 108; Dougherty v. Shillingsburg, 175 Pa. St., 56; Fortescue v. Barnett, 3 M. & K., 36, Ames' Cases on Trusts, 136.

The following cases are instances of attempted transfers held insufficient: Loring v. Hildreth, 170 Mass., 328; Richards v. Delbridge, *supra*; Welch v. Henshaw, 170 Mass., 409; Sullivan v. Sullivan, 161 N. Y., 554; Young v. Young, *supra*; Milroy v. Lord, *supra*; Beaver v. Beaver, 117 N. Y., 421.

Where, however, the settlor has not the legal title to the property, but only an equitable interest, or where the property is not capable of a legal transfer, it is generally held sufficient for the settlor to transfer the equitable title to the donee or trustee, and failure to comply with the formalities necessary to transfer the legal title to property of a similar nature will not invalidate the settlement. Sloane v. Cadogan, Sugden on Vendors and Purchasers, App., No. 24, Ames' Cases on Trusts, 135; Donaldson v. Donaldson, Kay, 711, Id., 146; Tarbox v. Grant, 56 N. J. Eq., 199. *Contra,* Edwards v. Jones, 1 M. & C., 226, Ames' Cases on Trusts, 140 (see also notes).

The settlor need not do everything necessary to vest a complete legal title in the donee or trustee, he need only do every act which is necessary to be done by *him* to effect that result. The fact that something remains to be done by the donee or trustee to obtain a complete legal title, as to give notice to a debtor, or to trustees, or to secure a transfer of stock on the company's books, will not prevent the enforcement of the settlement in equity. Fortescue v. Barnett, *supra*; Donaldson v. Donaldson, *supra.*

When Trust Perfectly Created—Settlor Declaring Himself a Trustee. The following are instances of voluntary settlements which have been supported, where the settlor has declared himself a trustee, without transfer of the title: *Ex parte* Pye, 18 Vesey, 140, Ames' Cases on Trusts, 123; Locke v. Farmers' Loan & Trust Co., 140 N. Y., 135, 141-143; Fowler v. Gowing, 152 Fed. Rep., 801, 803-11; Johnson v. Amberson, 140 Ala., 342, 347-8; Collins v. Lewis, 60 N. J. Eq., 488; *In re* Smith's Est., 144 Pa. St., 428; Starbuck v. Farmers' Loan & Trust Co., 28 App. Div., 272; Westlake v. Wheat, 43 Hun, 77; Phipard v. Phipard, 55 Hun, 433; Pingrey v. Nat. Life Assn., 144 Mass., 374; Kendrick v. Ray, 173 Id., 305; Eshbach's Est., 197 Pa. St., 153, 157-8.

See as to common law rule relating to real property, Pitman v. Pitman, 107 N. C., 159.

The weight of authority is in favor of the proposition that, where the settlor creates himself a trustee, there need be no delivery of any declaration of trust and no notice to the beneficiary, if there be "substantial evidence" of the intention to create a trust. Fowler v. Gowing, *supra*, at p. 807; *In re* Smith's Est., *supra*; Johnson v. Amberson, *supra*; 1 Perry on Trusts, 6th Ed., Sec. 103, and note (a) thereto; 28 Am. & Eng. Encyc. of Law, 2nd Ed., 899, note 2. *Contra*, Govin v. de Miranda, 76 Hun, 414; S. C., 79 Hun, 286.* In Eshbach's Est., *supra*, the trust was sustained, although it would seem that the settlor did not even separate the subject thereof, which was money, from his other money. It is doubted if this decision is sound law.

Power of Revocation. Reservation by the settlor of a power of revocation does not render a trust, otherwise perfectly created, imperfect. Van Cott v. Prentice, *supra*; Locke v. Farmers' Loan & Trust Co., *supra*; Brown v. Sphor, *supra*.

Tentative Trusts—Savings Bank Trusts. Under this head come what are commonly known as "savings bank trusts," which require special consideration. When a person deposits

* Govin v. de Miranda, 140 N. Y., 474, does not involve any question relating to the law of trusts.

his own money in a savings bank in his own name in trust for another, without more, and retains the pass-book, and no notice is given to the person named as beneficiary, the question arises whether a trust is created or not. The matter has been settled in New York, at least, by the following rule, namely: that such a disposition is a tentative trust merely, subject to revocation during the life of the depositor, but if the depositor dies before the beneficiary without having revoked the trust by withdrawal or otherwise, any money then remaining on deposit to the credit of such account will become the property of the beneficiary. Matter of Totten, 179 N. Y., 112; Martin v. Funk, 75 N. Y., 134; Willis v. Smith, 91 N. Y., 297; Merigan v. McGonigle, 205 Pa. St., 321. And a similar form of trust may be created by a deposit in the name of a third person. Lattan v. Van Ness, 107 App. Div., 393, affd., 184 N. Y., 601.

The depositor may revoke the trust during his lifetime by merely withdrawing the desposit, or otherwise. Matter of Totten, *supra*. So if the beneficiary dies before the depositor, the trust will be thereby revoked. Cunningham v. Davenport, 147 N. Y., 43; Haux v. Dry Dock Savings Instn., 2 App. Div., 165, affd., 154 N. Y., 736; Matter of U. S. Trust Co., 117 App. Div., 178, affd., 189 N. Y., 500.

The depositor may, however, by other acts, as by delivery of the pass-book, declarations at the time of the deposit, etc., create an irrevocable trust. Farleigh v. Cadman, 159 N. Y., 169; Robinson v. Appleby, 69 App. Div., 509, affd., 173 N. Y., 626; O'Brien v. Williamsburgh Savings Bank, 101 App. Div., 108.

In Massachusetts, notice to the beneficiary is necessary to establish such a trust. Brabrook v. Boston Five Cents Savings Bank, 104 Mass., 228; Clark v. Clark, 108 Id., 522, Ames' Cases on Trusts, 232. But not where the pass-book is delivered by the depositor to a third person to hold in trust for the beneficiary. Peck v. Scofield, 186 Mass., 108.

There may be revokable or tentative trusts of property other than savings bank deposits. Lattan v. Van Ness, 107 App. Div., 393, affd., 184 N. Y., 601. And the application of the

doctrine to real property was discussed in Webb's Academy v. Hidden, 118 App. Div., 711, 718, affd., 194 N. Y., 547.

c. Necessity of a Writing.

A[1]. At Common Law.

Real Property. In the absence of statute a trust can be created by parol and manifested or proved by parol evidence, and a writing is unnecessary, even where real property forms the subject. 1 Perry on Trusts, Secs. 73-77; Harvey v. Gardner, 41 Ohio St., 642.

But at common law, a trust in real property if declared by parol must be declared in connection with a conveyance operating by way of transmutation of possession, and if attempted to be created without such conveyance, as by covenant to stand seised, must be created by deed under seal, and perhaps also supported by a consideration, unless the property rests in grant. Pitman v. Pitman, 107 N. C., 159.

Personal Property. A trust in personal property may be created and proved by parol. Barry v. Lambert, 98 N. Y., 300.

B[1]. Under the Statute of Frauds.

The Statute of Frauds in general requires a trust affecting real property to be "manifested or proved by some writing signed by the party who is enabled by law to declare such trust or by his last will in writing." For the text of the English Statute, and the modifications in the several states, see, Ames' Cases on Trusts, 176, and Note 1; 28 Am. & Eng. Encyc. of Law, 873 *et seq.* For the New York Statute, see, Real Property Law, Sec. 242.

Sufficiency of Writing. The writing must be signed by the beneficial owner of the property at the time the trust is created, as he is the person enabled to declare a trust. It need not be signed by the trustee. Tierney v. Wood, 19 Beav., 330, Ames' Cases on Trusts, 182.

The grantee in a conveyance absolute on its face is, in the

eye of the law, the beneficial owner of the property conveyed, and therefore the person capable of declaring a trust in such property, and this is true even if he took the conveyance upon an oral trust, for such trust is void by the Statute of Frauds. Hutchins v. Van Vechten, 140 N. Y., 115; Myers v. Myers, 167 Ill., 52, 62. Subsequent declarations by the grantor in such conveyance, be they oral or written, are ineffectual to cut down the estate conveyed. Harvey v. Gardner, 41 Ohio St., 642; Myers v. Myers, *supra.*

Unless the statute requires a trust to be created by a writing it is sufficient if it be manifested or proved by a writing, which may be executed after it is created. Hutchins v. Van Vechten, *supra*; Aller v. Crouter, 64 N. J. Eq., 381, 390; Stratton v. Edwards, 174 Mass., 374; McClellan v. McClellan, 65 Me., 500.

This is the rule in most jurisdictions. It was not, however, the rule in New York between 1830 and 1860. The statute then in force required a trust affecting real property to be created by a writing. For the rules in the various states see, Ames' Cases on Trusts, p. 178; Am. & Eng. Encyc. of Law, *supra.*

The writing must show the trust completely without resort to parol testimony. Cook v. Barr, 44 N. Y., 156; Dillaye v. Greenough, 45 N. Y., 438; Martin v. Baird, 175 Pa. St., 540, 547.

The declaration may consist of several writings and if properly connected by reference only one need be signed. Hutchins v. Van Vechten, *supra*; Van Cott v. Prentice, 104 N. Y., 45; McClellan v. McClellan, 65 Me., 500.

An answer in a suit in equity is a proper writing if it contains a sufficient statement of the trust. Cook v. Barr, *supra*, (*semble*).

When Statute Does Not Apply. If a trust in real property is created by parol and the trustee performs the obligation imposed upon him by the terms of the trust, the statute no longer applies; and this is true where the property has been disposed of in pursuance of the trust and replaced by personal property which the trustee refuses to surrender or apply. Bork v. Martin, 132 N. Y., 280; Robbins v. Robbins, 89 N. Y.,

251; Silvers v. Potter, 48 N. J., Eq., 539; Polk v. Boggs, 122 Cal., 114.

And where the party seeking to enforce the trust has performed or partly performed his part of an oral agreement out of which the trust arises, and it would work a fraud to permit the other party to escape under cover of the statute, equity follows the rule that it will not permit the statute to become an instrument of fraud, and will declare a constructive trust. Ryan v. Dox, 34 N. Y., 307; Canda v. Totten, 157 N. Y., 281.

The mere payment of purchase money or the mere breach of an oral agreement is not in general enough to take the case out of the statute. There must have been some interest in the subject matter prior to the arrangement, which, by reason thereof, the party seeking to establish a trust has failed to protect by other means, or there must be other grounds of equitable interference. Bispham's Equity, Sec. 385; Levy v. Brush, 45 N. Y., 589; Bryan v. Douds, 213 Pa. St., 221.

This point will be more fully considered under the head of constructive trusts.

Personal Property. The Statute of Frauds does not in most jurisdictions require a trust in personal property to be created, manifested or proved by a writing. Barry v. Lambert, 98 N. Y., 300; Chase v. Perley, 148 Mass., 289, 294; Danser v. Warwick, 33 N. J. Eq., 133, Ames' Cases on Trusts, 186. But the oral evidence must be clear and convincing. Allen v. Withrow, 110 U. S., 119.

C[1]. Under Statute of Wills.

In General. It is almost needless to say that if an attempt is made to create a testamentary trust, it must be done by will duly executed as required by statute. Not only must the fact of the trust appear therefrom, but also its terms, so that they can be ascertained without resort to extrinsic evidence (except such as is admissible for purposes of construction). Bryan v. Bigelow, 77 Conn., 604; Bryan's Appeal, 77 Conn., 240; Juniper v. Batchelor, Weekly Notes (1868), 197, Ames' Cases on Trusts, 189, and notes.

What Trust Testamentary. It is often difficult to determine whether a disposition is testamentary or not. If an attempt is made, otherwise than by will, to create a trust to take effect —that is, title to pass—only on the decease of the settlor, it will be invalid. Towle v. Wood, 60 N. H., 434. But the mere reservation of a power of revocation to the settlor during his life will not invalidate a trust created by deed. Van Cott v. Prentice, 104 N. Y., 45; Brown v. Spohr, 87 App. Div., 522, affd., 180 N. Y., 201. So also the settlor may reserve to himself the beneficial enjoyment of the property during his life, if there be a present transfer of the title. Kelly v. Parker, 181 Ill., 49; P. R. R. Co. v. Stevenson, 63 N. J. Eq., 634, 638. And he may reserve both the beneficial enjoyment and power of revocation. Kelly v. Parker, *supra.* See also Robb v. Washington and Jefferson College, 185 N. Y., 485, 492.

Fraud. If a testator is induced to make a will in favor of a person by the latter's oral promise to apply the property willed to some purpose other than his own benefit, or if a person is induced to refrain from making or altering a will by a like promise made by one who would but for the intended will or alteration become entitled to some portion of the former's property, and such person receives the property and refuses to perform the oral trust, such refusal is a fraud, and equity will raise a constructive trust. O'Hara v. Dudley, 95 N. Y., 403.

This subject will be more fully considered under the head of constructive trusts.

B. Validity of Purpose.

1. At Common Law.

In the absence of a statute limiting the purposes for which express trusts may be created, it would seem that an express trust may be created for any purpose not generally illegal. 1 Reeves on Real Property, Sec. 334.

If it is merely a passive trust in real estate, created by declaring a use upon a use, it will in most jurisdictions be

executed by statute, and the legal title vested in the *cestui que trust*. Passive trusts in real property, even where legal, are now very rare. See 1 Reeves on Real Property, Sec. 330; 3 Pomeroy's Equity Jurisprudence, 3d Ed., Sec. 988. An instance seems to be presented by City Missionary Society v. Memorial Church, 186 Mass., 531.

A trust may also be invalid in whole or in part because in conflict with a statute or rule against perpetuities. Kountz's Est., 213 Pa. St.. 390, Pitzel v. Schneider, 216 Ill., 87.

2. Under New York Statute.

a. Real Property.

In General. The Revised Statutes, passed in 1827 and 1828, and which went into effect January 1, 1830, abolished all express trusts and uses except those permitted by statute. These provisions are now embodied in the Real Property Law, Laws of 1909, Ch. 52, Secs. 90-117.

Passive Trusts. All passive trusts, which are defined by the statute, in substance, as those in which the beneficiary is entitled to the actual possession of the property and to the receipt of the rents and profits thereof, are abolished, and the legal title is vested in the person beneficially entitled. Real Property Law, Secs. 92 and 93; Verdin v. Slocum, 71 N. Y., 345; Adams v. Adams, 114 App. Div., 390, affd., *sub nom.* Adams v. Bristol, 187 N. Y., 547.

Whether a trust is active or passive is a question of fact in each case, depending on the intention to be ascertained by a construction of the instrument creating the trust. Where the beneficiary is given power to dispose of or take possession of the corpus, at his option, the trust will generally be declared passive. Wainwright v. Low, 132 N. Y., 313, 319; Wendt v. Walsh, 164 N. Y., 154.

In the following cases where the question was raised the trusts were held to be active: Kiah v. Grenier, 56 N. Y., 220, 225; Donovan v. Van De Mark, 78 N. Y., 244.

Where an active trust becomes passive, the statute at once

executes it and vests the legal title in the beneficiary. Hopkins v. Kent, 145 N. Y., 363.

Express Trusts Permitted by Statute: In General. Four classes of express trusts are permitted by statute; any trust not included in one of these classes is invalid as a trust. Hawley v. James, 16 Wend., 61; N. Y. Dry Dock Co. v. Stillman, 30 N. Y., 174.

Same Subject: First Class. "To sell real property for the benefit of creditors." Real Property Law, Sec. 96, Subd.1.

This provision authorizes general assignments for the benefit of creditors, whenever the same cover real property, but it is not limited to general assignments, and a debtor may, if solvent, convey a portion of his property to a trustee to pay a portion of his debts, with a proviso that any surplus shall be returned to him. Knapp v. McGowan, 96 N. Y., 75, 84-87.

The direction to sell must be imperative, and the payment of debts must be a primary purpose of the trust and not a mere incident. Heermans v. Burt, 78 N. Y., 259, 265; Woerz v. Rademacher, 120 N. Y., 62. See also, Heermans v. Robertson, 64 N. Y., 332.

Same Subject: Second Class. "To sell, mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon." Id., Subd. 2.

The following cases are instances of valid trusts under this subdivision: Morse v. Morse, 85 N. Y., 53; Russell v. Hilton, 80 App. Div., 178, 187.

The direction to sell, mortgage or lease must be imperative. Cooke v. Platt, 98 N. Y., 35; Henderson v. Henderson, 113 N. Y., 1, 8-13; Steinhardt v. Cunningham, 130 N. Y., 292, 300; Weeks v. Cornwell, 104 N. Y., 325-340; Chamberlain v. Taylor, 105 N. Y., 185, 191.

A question early arose as to the meaning of the word "lease" in this subdivision (Hawley v. James, 16 Wend., 61), some authorities maintaining that it meant to lease at a rental payable at stated periods, and apply the income thus received

to the reduction of incumbrances, etc. It was eventually pointed out, however, that such a construction would authorize an accumulation expressly prohibited by another section of the statute (see below), and therefore the word has been authoritatively settled to mean a lease by way of alienation—that is, for a fixed period for a lump sum, or to the person entitled to the sum charged for a period sufficient to satisfy the same. Hascall v. King, 162 N. Y., 134, 145, overruling Becker v. Becker, 13 App. Div., 342, 346. See cases cited in these authorities for the history of the discussion.

Same Subject: Third Class. "To receive the rents and profits of real property, and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto." Id., Subd. 3.

It was at one time contended that a trust to receive the rents and profits of real property and *pay them over* to a beneficiary was not valid under this subdivision, and that the manner of application must be left to the discretion of the trustee; but the law was finally settled otherwise by Leggett v. Perkins, 2 N. Y., 297.

A trust under this subdivision need not dispose of the entire income, and a trust to pay annuities is valid, and the trustees take title to the entire corpus, although only a portion of the income is necessary for the annuities. Cochrane v. Schell, 140 N. Y., 516.

It is not sufficient merely to authorize the collection of the rents and profits; they must be devoted to the use of some beneficiary. Holly v. Hirsch, 135 N. Y., 590; Henderson v. Henderson, 113 N. Y., 1. And the right of the trustee to receive the rents and profits, though not expressly limited as to time, expires with the expiration of the time during which they are directed to be applied. Manice v. Manice, 43 N. Y., 303, 363.

Same Subject: Fourth Class. "To receive the rents and profits of real property, and to accumulate the same for the purposes, and within the limits, prescribed by law." Id., Subd. 4.

An accumulation of the rents and profits of real property may be directed for the benefit of one or more minors in being, in which case it must commence on the creation of the estate out of which the rents and profits are to arise, and must terminate at or before the expiration of the minority of the beneficiaries. An accumulation may also be directed to commence at a time subsequent to the creation of the estate, in which case it must commence within the time limited for the vesting of future estates, and during the minority of the beneficiaries, and must terminate at or before the expiration of such minority. Real Property Law, Sec. 61.

The accumulation must be for the sole benefit of the infant during whose minority it is to continue. If, therefore, the accumulations are directed to be added to the corpus and handed over to remaindermen, the provision is invalid, even though the life beneficiary is to receive the income produced by such accumulations during his life after minority. Pray v. Hegeman, 92 N. Y., 508.

It seems, however, that a testator may provide for the disposition of accumulated income in case the infant for whose benefit the accumulation is directed should not live to reach the age of twenty-one years. Smith v. Parsons, 146 N. Y., 116.

A direction to devote a portion of the rents and profits of real property to the reduction of mortgages thereon, or on other real property belonging to the estate, is unlawful, for such application of the income would increase the corpus of the estate, and thus work an unlawful accumulation. Hascall v. King, 162 N. Y., 134.

It seems, however, that a direction to apply income to the necessary improvement of property used in a business which the trustees are directed to carry on is not illegal. Matter of Nesmith, 140 N. Y., 609-615.

If an accumulation be directed to continue for a longer period than the minority of the beneficiary, it is void only as to the time beyond the minority. Real Property Law, Sec. 61.

Certain Devises Deemed Powers. "A devise of real property to an executor or other trustee, for the purpose of sale or

mortgage, where the trustee is not also empowered to receive the rents and profits, shall not vest any estate in him; but the trust shall be valid as a power, and the real property shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power." Real Property Law, Sec. 97; Manice v. Manice, 43 N. Y., 303, 364; Heermans v. Robertson, 64 N. Y., 332, 342; Chamberlain v. Taylor, 105 N. Y., 185, 191.

Perpetuities. Perpetuities in connection with trust estates may be created in three ways: (1) by future contingent limitations; (2) by statutory inhibition against alienation; (3) by express prohibition of alienation in the instrument creating the trust. With the first method we are not concerned, for future limitations in New York generally deal with the legal estate, although often contained in instruments creating trusts.

As the interest of the beneficiary in a trust of the third class is inalienable (Real Property Law, Sec. 103), such a trust must be limited to two lives in being from the creation of the trust, or in case of a trust created by will, from the decease of the testator. Real Property Law, Sec. 42; Central Trust Co. v. Egleston, 185 N. Y., 23; Woodgate v. Fleet, 64 N. Y., 566; Beekman v. Bonsor, 23 N. Y., 298, 314-316.

The lives by which the duration of the trust is measured need not be the lives of the beneficiaries, provided, however, there is nothing in the terms of the trust to keep it alive beyond the lives of the beneficiaries. Crooke v. County of Kings, 97 N. Y., 421, 435-440; Bailey v. Bailey, Id., 460.

The lives selected to measure the duration of the trust need not be the same in every contingency, provided that in no contingency can the trust last longer than two lives in being from the creation of the estate. Schermerhorn v. Cotting, 131 N. Y., 48.

Where there are more than two life beneficiaries (assuming their lives to be the measure of the duration of the trust), the trust will not be invalid, if the interests of the respective beneficiaries are severable, or, in other words, if there be a separate trust for each beneficiary, even though the corpus is

not to be divided; for in such case the share or interest of each beneficiary becomes alienable at his death. Vanderpoel v. Loew, 112 N. Y., 167. See also, Locke v. Farmers' Loan & Trust Co., 140 N. Y., 135, 143-145; Allen v. Allen, 149 N. Y., 280.

If the instrument creating the trust directs the property to be held for an unlawful period, the trust will be invalid. Adams v. Perry, 43 N. Y., 487, 497-500. But permission to defer a directed sale of real property for three years is not objectionable. Robert v. Corning, 89 N. Y., 225.

The trust is obnoxious to the statute against perpetuities, although the property which constitutes the subject thereof may be sold and converted into other property, if by the terms of the trust any fund or property is to be held for more than two lives in being. See cases cited *supra.*

When Statute Does Not Apply. When the trustee is beneficially interested in the property it has been held that the statute does not apply. King v. Townshend, 141 N. Y., 358, 363. It is difficult to see, however, how this case can be justified on principle.

When the instrument creating the trust directs real property to be sold, and the proceeds are to be devoted to certain trusts, the statute does not apply to such trusts. By the rule of equitable conversion they are treated as trusts of personality. Russell v. Hilton, 80 App. Div., 178, 186-187; Kane v. Gott, 24 Wend., 641, 659-664.

b. Personal Property.

Not Within Statute. The New York statute of uses and trusts does not apply to personal property, hence a trust in such property may be created for any purpose valid at common law. Holmes v. Mead, 52 N. Y., 332, 342-344; Kane v. Gott, *supra.*

Accumulations. Accumulations of the income of personal property are permitted on substantially the same conditions as those of the rents and profits of real property. Personal Property Law, Sec. 16.

Perpetuities. The provisions as to perpetuities and alienability of the beneficiary's interest are substantially the same as those for real property. Personal Property Law, Secs. 11 and 15.

c. Invalid Trust Enforced as Power in Trust.

"Where an express trust relating to real property is created for any purpose not specified in the preceding sections of this article, no estate shall vest in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, shall be valid as a power in trust, subject to the provisions of this chapter. Where a trust is valid as a power, the real property to which the trust relates shall remain in or descend to the persons otherwise entitled, subject to the execution of the trust as a power." Real Property Law, Sec. 99; N. Y. Dry Dock Co. v. Stillman, 30 N. Y., 174, 191, 193; Manice v. Manice, 43 N. Y., 303, 364; Cooke v. Platt, 98 N. Y., 35, 38; Henderson v. Henderson, 113 N. Y., 1, 11-12.

3. Where Trust Partially Invalid.

If there are several distinct trusts created by one instrument and some are valid and others not, those which are valid will be enforced.

If, however, the valid and invalid provisions are parts of a single scheme and those which are invalid can be separated from the rest and disregarded without interfering with the valid provisions, the courts will enforce the valid provisions. Adams v. Perry, 43 N. Y., 487, 500; Smith v. Chesebrough, 176 N. Y., 317.

But if the invalid provisions form the foundation of the scheme, so that to cut them out would destroy the main purpose of the creator of the trust, the subsidiary valid provisions must fail also. Holmes v. Mead, 52 N. Y., 332, 344; Matter of Dewitt, 113 App. Div., 790, affd., on opinion below, 188 N. Y., 567.

4. Conflict of Laws—New York Rule.

Where property is given to trustees upon a trust to be executed in another state, which is valid by the laws of that state, and all that the courts of New York have to do is to direct the property to be turned over to the foreign trustees, the trust will be enforced to that extent, though it would be invalid if it were to be executed here. Chamberlain v. Chamberlain, 43 N. Y., 424; Hope v. Brewer, 136 N. Y., 126.

This rule cannot be applied where real property is concerned unless a conversion is directed.

And where a resident of another state makes a bequest of *personal property* upon trusts valid by the laws of his domicile to be executed in this state, it will not be declared void by our courts though it would have been invalid had the testator been domiciled in New York. Cross v. U. S. Trust Co., 131 N. Y., 330, 339. See also, Dammert v. Osborn, 140 N. Y., 30.

C. Express Trusts for Special Purposes.

1. Spendthrift Trusts.

Spendthrift trusts are those which provide for the payment of the income of the trust property to the beneficiary, but prohibit his interest from being alienated and the income from being anticipated or subjected in advance of payment to the claims of his creditors. Trusts of this character will be treated under the head, "Transfer of Trust Property—Rights of Creditors."

2. Trusts for Married Women.

In General. By the common law the property rights of a married woman were completely subordinated to the control of her husband. In the theory of the law he was expected in return to pay her debts and provide for her according to her station in life, but in many cases husbands failed to do this, and thus a woman who had had property might be left without proper means of support for herself and her children, and

the remedies furnished by the common law were inadequate. To provide for this condition, the Court of Chancery took upon itself to enforce trusts for the separate use of married women. By the usual terms of such a trust property was vested in trustees the income to be paid to the married woman, during her life "for her sole and separate use," with remainder usually containing some provision for the children of the marriage. Such trusts might, however, be created with very little formality, and if in any conveyance of property to a woman by will or *inter vivos* it was declared that it was to be for her sole and separate use, equity would treat it as a trust for her benefit, and enable her to enjoy it free from the control of her husband. An important question, which early arose in regard to these trusts, was whether the wife could alienate her interest, and it was decided by Chancery that she had the same power over it as a *femme sole*, and hence could alienate it. Thus in many cases the object of the trust was frustrated. Lord Thurlow finally invented the clause against anticipation, which, if inserted in the instrument of settlement, prevented the married woman from alienating her interest in the income of the trust property.

Another question over which there has been great discussion is whether in case the woman was unmarried when the property was conveyed to her for her sole and separate use, or afterward became *discovert*, the trust would attach in case of any subsequent marriage. Different rules have been adopted in different states. In Massachusetts, for example, the settlement must be made in favor of a woman then married or in immediate contemplation of marriage, and if she subsequently becomes *discovert* and afterwards marries again, the property will be subject to the control of her husband as other property.

In many other states it has been held that where property is conveyed to a woman for her sole and separate use, whether she be then married or single, the trust will attach whenever and as often as she becomes *covert*, but when *discovert* the property will be subject to her absolute control as her other property.

For a general discussion of this subject see, 1 Reeves on Real Property, Sec. 336; 2 Perry on Trusts, Secs. 625-686.

In New York such trusts are now of no importance, for a married woman has by statute the same control of her property as a *femme sole*. If it is desired to prevent her alienating it, a trust can be created under subdivision 3, of section 96, of the Real Property Law.

3. Charitable Trusts.

In General. Charitable trusts are those created for a charitable purpose, and differ from other express trusts in that the beneficiaries need not be certain and definite. Trusts of this character were early enforced by the Court of Chancery, and were afterward regulated by the Statute of Charitable Uses, enacted in 43 Elizabeth, which has been since regarded as pointing out in a general way the purposes for which such trusts might be created—that is, trusts of this character have been limited to those created for some purpose specified in the preamble of the statute of 43 Elizabeth, or related thereto, or else created for purposes of charity generally. Morice v. The Bishop of Durham, 10 Ves., 522, Ames' Cases on Trusts, 195. For a general discussion of the subject, see, 1 Reeves on Real Property, Secs. 337-350; Jackson v. Phillips, 14 Allen (Mass.), 539.

In the United States. Charitable trusts are generally recognized and enforced in the United States. It was at first supposed that they had their origin in the statute of 43 Elizabeth, and hence in states where that statute had been repealed such trusts were in some instances declared invalid. Trustees v. Hart's Exrs., 4 Wheaton, 1. Later, however, it was discovered that the jurisdiction of Chancery over these trusts antedated that statute, and was therefore inherent; hence in general they have been supported even where that statute is not in force. Vidal v. Girard's Exrs., 2 How. (U. S.), 127, 191-197, and note, pp. 155-161; Perin v. Carey, 24 How. (U. S.), 465.

Purposes. The purposes for which charitable trusts may be created may for the most part be divided into four classes,

religious, educational, eleemosynary and governmental. 1 Reeves on Real Property, Sec. 339.

The purpose must be wholly charitable and hence a single trust for indefinite beneficiaries, the purposes of which are partly charitable and partly private, will be void. Minot v. Attorney General, 189 Mass., 176, 179. But where the instrument creating the trust devotes a certain part of the property or income to valid charitable purposes, and the rest to invalid private purposes, the trust will be sustained as a charity to the extent of the property to be devoted thereto. St. Paul's Church v. Attorney General, 164 Mass., 188.

Religious Purposes. The following are instances of valid trusts for religious purposes: McAlister v. Burgess, 161 Mass., 269; Christ Church v. Trustees, 67 Conn., 554; Alden v. St. Peter's Church, 158 Ill., 631.

Trusts for the purpose of having masses said for the repose of souls have been held to be within this class on the ground that the persons attending the services would receive a benefit. Hoeffer v. Clogan, 171 Ill., 462. *Contra*, Festorazzi v. St. Joseph's Ch., 104 Ala., 327. See also, Gilman v. McArdle, 99 N. Y., 451; Matter v. Eppig, 63 Misc., 613.

Educational Purposes. The following are instances of valid trusts for educational purposes: Perin v. Carey, 24 How. (U. S.), 465; People v. Cogswell, 113 Cal., 129, 136; George v. Braddock, 45 N. J. Eq., 757; Treat's Appeal, 30 Conn., 113; Bedford v. Bedford's Admr., 99 Ky., 273.

A trust to secure the passage of laws granting political rights to woman by means of the "preparation and circulation of books, the delivery of lectures," etc., is not a valid charitable trust. Jackson v. Phillips, 14 Allen (Mass.), 539, 571.

Eleemosynary Purposes. The following are instances of valid trusts for eleemosynary purposes: Towle v. Nesmith, 69 N. H., 212; Trim's Est., 168 Pa. St., 395; Haines v. Allen, 78 Ind., 100; Darcy v. Kelly, 153 Mass., 433; Dailey v. New Haven, 60 Conn., 314.

Governmental Purposes. The following are instances of

valid trusts for governmental purposes: Coggeshall v. Pelton, 7 Johns. Ch., 292; Est. of Smith, 181 Pa. St., 109; Mowry v. City of Providence, 10 R. I., 52.

General Charitable Purpose. Trusts for purposes of charity in general are valid in England. Morice v. The Bishop of Durham, *supra*. In the United States different rules have been adopted in the various states. In some, as for example, Massachusetts, the rule is very liberal. Saltonstall v. Sanders, 11 Allen (Mass.), 446; Weber v. Bryant, 161 Mass., 400. In other states the rule is more strict. Livesey v. Jones, 55 N. J. Eq., 204, aff'd., 56 Id., 453. See, 5 Am. & Eng. Encyc. of Law, 2nd Ed., p. 933. See also discussion of *cy pres* doctrine below.

Where the word "benevolent" has been used, it has sometimes been held equivalent to "charitable." Murphy's Est., 184 Pa. St., 310; Weber v. Bryant, *supra*. *Contra*, Morice v. The Bishop of Durham, *supra*.

Indefiniteness of Beneficiaries. The indefiniteness of the beneficiaries is a necessary element of all charitable trusts, and a trust in which the beneficiaries are ascertained or capable of being ascertained by the ordinary rules of judicial construction cannot be treated as charitable. Russel v. Allen, 107 U. S., 163; Kent v. Dunham, 142 Mass., 216; Bullard v. Chandler, 149 Mass., at p. 540 (*semble*); Coe v. Washington Mills, Id., 543.

The beneficiaries may be so indefinite, however, that in America the trust will not, in the absence of trustees, be enforced. This question will be more fully considered under the discussion of the *cy pres* doctrine.

The Cy Pres Doctrine. The *cy pres* power is a name applied to two very different functions exercised by the Chancellor with respect to the application of property devoted to charitable uses in a manner different from that directed or in the absence of directions. One has been denominated judicial and the other prerogative; one is the act of a court of justice, the other an arbitrary exercise of royal authority. There are two classes of cases in which the *cy pres* power has been employed, (1) where the special purpose of the trust, or, in other

words, the method of application of the fund, has been fully set forth in the instrument creating the trust, but for some reason the special purpose could not be carried out, and (2) where the special purpose or method of application has not been fully set forth, and there was no trustee. The first class may be divided into two subordinate classes, (a) where, since the trust was created, it has become impossible or inexpedient to carry it out according to the expressed intention, in which case the judical *cy pres* power is applied, and (b) where the purpose of the trust is illegal because in contravention of the established religion or the general policy of the country, in which case the prerogative *cy pres* power is applied. The second class may likewise be divided into (a) cases where a special charitable purpose is indicated but only in a general way, in which the judicial *cy pres* power is applied, and (b) cases where only a general charitable purpose is indicated, no method of application being pointed out, in which the prerogative *cy pres* power is applied. This classification may be conveniently shown by the following diagram:

	1. Special purpose fully stated.	2. Special purpose not fully stated.
Judicial *cy pres.*	a. Purpose impossible of execution or inexpedient.	a. Special purpose indicated in a general way.
Prerogative *cy pres.*	b. Purpose illegal as contrary to established religion, etc.	b. No special purpose indicated—trusts for charity in general.

Taking up the first class, if by reason of a change of circumstances or change of law since the trust was created, it becomes impossible to carry it out, according to the intent of the creator, and there is nothing to indicate that the charitable purpose of the creator of the trust is limited to the precise method of application set forth, the court, by the exercise of the judicial

cy pres power, will direct the property to be applied in a manner as nearly as possible like that indicated. The following are instances: Jackson v. Phillips, 14 Allen (Mass.), 539, 573; Atty. Gen. v. Briggs, 164 Mass., 561; Amory v. Atty. Gen., 179 Mass., 89.

Where, however, it appears that it is the intent of the creator of the trust that the particular plan indicated shall be followed and no other, if that method becomes impossible, the trust must fail. Teele v. Bishop of Derry, 168 Mass., 341.

The judicial *cy pres* power is exercised by referring the matter to a master in chancery or equivalent officer to devise a scheme for the application of the property, as nearly as possible—which is the meaning of the words *cy pres*—like that intended by the creator of the trust.

Where, however, the purpose of the trust is illegal by the general policy of the realm, or contrary to the established religion, under the English system the prerogative *cy pres* power may be exercised and the property be disposed of under the sign manual of the Crown for some other charitable purpose perhaps entirely different from that intended by the creator of the trust. Such cases are very rare. For instances see, De Costa v. De Pas, Ambler, 228; Cary v. Abbot, 7 Ves., 490; Rex v. Lady Portington, 1 Salk., 162.

In the United States the prerogative *cy pres* power exists in the people and may be exercised by the legislature. Mormon Church v. U. S., 136 U. S., 1, 50; S. C., 140 U. S., 665; S. C., 150 U. S., 145. It cannot in the absence of statute be exercised by any court, and therefore any trust for an illegal purpose must fail.

In the second class of cases above mentioned, if the method of application be indicated in a general way, but the details be left to be worked out in the course of administration, and there are no trustees, it is a case for the judicial *cy pres* power, and the matter may be referred to a master to devise a scheme. If, however, the gift is to charity generally no method of application being pointed out—or what is saying the same thing, the beneficiaries being so indefinite that they

cannot be ascertained by any judicial action—it is then, in the absence of trustees, a case for the exercise of the royal prerogative. Moggridge v. Thackwell, 7 Ves., 36. See also, Paice v. Archbishop of Canterbury, 14 Ves., at p. 372.

As the prerogative *cy pres* power has not in general been conferred upon any court in the United States, such a trust must fail unless there are trustees or unless there is a statute providing for such cases. For a general discussion of this subject see, 1 Reeves on Real Property, Secs. 346-349; Jackson v. Phillips, 14 Allen (Mass.), at pp. 574-576.

The following are instances of trusts held sufficiently definite to be executed under the judicial *cy pres* power. Attorney General v. Johnson, Ambl., 190; Moggridge v. Thackwell, *supra*; Missionary Society v. Chapman, 128 Mass., 265; Darcy v. Kelly, 153 Mass., 433; Dailey v. New Haven, 60 Conn., 314; De Silver's Est., 211 Pa. St., 459.

The following are instances of trusts held too indefinite and hence capable of being executed only under the prerogative *cy pres* power, or, in America, not capable of being executed at all. Attorney General v. Herrick, Ambl., 712; Attorney General v. Matthews, 2 Levinz, 167; Attorney General v. Syderfen, 1 Vern., 224; Fontain v. Ravenel, 17 How. (U. S.), 369.

For rules in the various states on the question of indefiniteness of beneficiaries and *cy pres* power, see, 5 Am. & Eng. Encyc. of Law, 2nd Ed., pp. 905-912 & 942, and cases cited.

Perpetuities and Accumulations. Charitable trusts are not in general invalidated by provisions creating perpetuities. 1 Reeves on Real Property, Sec. 350; Jones v. Habersham, 107 U. S., 174, 185; Society v. Atty. Gen., 135 Mass., 285. Nor are they subject in general to prohibitions against accumulating the income of property. Codman v. Brigham, 187 Mass., 309, 313; St. Paul's Church v. Attorney General, 164 Mass., 188, 203.

Charitable Trusts in New York. The history of charitable trusts in New York is peculiar. At first they were supported, and the general features of the English system were declared to be in force in New York. Williams v. Williams, 8 N. Y.,

525. Afterward it was decided that, in repealing the statute of 43 Elizabeth and about the same time establishing a system of corporate charities, the legislature intended to abolish such trusts; and in answer to the argument that such trusts were enforced before the statute of 43 Elizabeth the Court of Appeals said that at the time of such repeal it was supposed that charitable trusts had their origin in that statute, and that the subsequent discovery that they did not could not have a bearing upon the legislative intent. Levy v. Levy, 33 N. Y., 97. Accordingly charitable trusts were for a long period void in New York. Holland v. Alcock, 108 N. Y., 312, 324; Tilden v. Green, 130 N. Y., 29.

By Chapter 701 of the Laws of 1893, it was provided that where a trust was created for "religious, educational, charitable or benevolent uses," it should not be void because of uncertainty of beneficiaries, and directions were given as to the enforcement of such trusts. This law was amended by Laws of 1901, Ch., 291. The substance of this statute has now been embodied in the Real Property Law, Sec. 113, and the Personal Property Law, Sec. 12.

Under this statute charitable trusts are now valid in New York, even where perpetuities are created. Allen v. Stevens, 161 N. Y., 122. There are limitations upon the power to create charitable trusts, even under this statute. The Court of Appeals has strongly intimated, if not decided, that the purpose must be definite and not general, and it has been held that it must be exclusive of all private purposes. Matter of Shattuck, 193 N. Y., 446. For other cases, see Bowman v. Domestic and Foreign Missionary Society, 182 N. Y., 494; Robb v. Washington and Jefferson College, 185 N. Y., 485, 495; Matter of Robinson, 203 N. Y.,. 380; Rothschild v. Goldenberg, 103 App. Div., 235, affd., 188 N. Y., 327.

For a history of charitable trusts in New York see, 1 Reeves on Real Property, pp. 493-503.

D. Powers in Trust.

In General. Under the head of express trusts may properly be considered the subject of powers in trust. A power is an

authority to dispose of an estate in real property which is not vested in the donee of the power. A power in trust, therefore, differs from a true trust only in the fact that the trustee does not have the legal estate. For a discussion of the subject of powers in trust, see, 1 Perry on Trusts, Secs. 248-258.

When Imperative. The most important question concerning powers in trust is whether a power is imperative or discretionary. If imperative its execution will be directed by a court of equity in case of the failure or refusal of the donee to execute it, but otherwise if it is discretionary.

A trust power is generally held to be imperative unless expressly made discretionary, even though granted in permissive words. Harding v. Glyn, 1 Atk., 469, Ames' Cases on Trusts, 78, and note; Brown v. Higgs, 8 Ves., 561, affd., 18 Id., 192; N. Y. Real Property Law, Sec. 157; Smith v. Floyd, 140 N. Y., 337; Dominick v. Sayre, 5 N. Y. Super., 555; Delany v. McCormack, 88 N. Y., 174, 182. Where, however, a grantor reserves to himself a portion of the power of disposition which he already has, a power in trust will not be created. Towler v. Towler, 142 N. Y., 371.

There is a possible distinction between powers of appointment and those which are purely administrative, such as powers of sale given to trustees who do not have the fee. It is possible that the latter might be considered discretionary more readily than the former. Coleman v. Beach, 97 N. Y., 545, 557; Miller v. Wright, 109 N. Y., 194-200; Sites v. Eldridge, 45 N. J. Eq., 632.

Where, however, the exercise of an administrative power, though created by permissive words, is necessary to carry out the terms of the instrument creating it, it will be deemed imperative. Matter of Gantert, 136 N. Y., 106; Venable v. Mercantile Trust & Dep. Co., 74 Md., 187, 191; May v. Brewster, 187 Mass., 524.

This much may be said, however, that a power of appointment is always imperative if it be considered a power in trust at all; for if there is no obligation to appoint, there is no trust.

An administrative power, on the other hand, may be in trust and yet be purely discretionary.

Validity of Purpose. A trust power cannot be created to accomplish any purpose for which a true trust would be invalid (except as permitted by N. Y. Real Property Law, Sec. 99), and the same rules as to certainty of beneficiaries and perpetuities apply. Tilden v. Green, 130 N. Y., 29, 52-55; Murray v. Miller, 178 N. Y., 316, 323; Genet v. Hunt, 113 N. Y., 158, 165-171.

Manner of Execution. In general where there is an imperative power of appointment among a designated class, which the donee fails to execute, equity will decree an equal division; but if the discretion to be exercised in the selection of the beneficiaries from among the class depends upon facts which can be ascertained by a judicial inquiry, then the court may "look with the eyes of the trustee" and substitute its own judgment for his. Glover v. Condell, 163 Ill., 566, 594.

New York Statute. Powers in New York, including powers in trust, are regulated by statute which is in the main declaratory of the common law. N. Y. Real Property Law, Secs. 130-182.

VII.

IMPLIED TRUSTS.

Implied trusts are generally passive in their nature. The only obligation of the trustee is in general to transfer title to the *cestui que trust*, or to some person nominated by him.

A. Resulting Trusts.

Resulting trusts are defined under the head of Classification, *ante*. They are divided into four classes according to the circumstances out of which they arise, as follows:

(1) Where purchase money is paid by one and title taken in the name of another.

(2) Purchase with fiduciary funds.

(3) Voluntary conveyance.

(4) Where property is given in trust, and the trust is not declared, in whole or in part, or fails, or is illegal or void. Bispham's Equity, Sec. 79.

1. Purchase Money Paid by One, Title Taken in Name of Another.

In General. This trust is implied by equity on the presumption that the party who pays the purchase money intends to become the beneficial owner. Such presumption is disputable and may be rebutted by proof of a contrary intent. For a discussion of the general doctrine see, Dyer v. Dyer, 2 Cox, 92, 1 White & Tudor (14th Am. Ed.), 314; Jackson v. Matsdorf, 11 Johns., 91. The following cases are instances of trusts of this class: Third National Bank v. Carey, 39 N. J. Eq., 25; Lufkin v. Jakeman, 188 Mass., 528; Gaynor v. Quin, 212 Pa. St., 362; Long v. Mechem, 142 Ala., 405.

Where the consideration is paid by A and title taken in the name of A and B, a trust results in favor of A to the extent of the interest conveyed to B. Ward v. Ward, 59 Conn., 188.

Part Payment of Purchase Money. Where the person seeking to establish a resulting trust has paid only a part of the purchase money, he must have paid a definite portion for an aliquot part of the property, and if he has not done so a resulting trust will not be declared. Bailey v. Hemenway, 147 Mass., 326; Dudley v. Dudley, 176 Mass., 34; Devine v. Devine, 180 Ill., 447; Olcott v. Bynum, 17 Wall., 44, 59-60; Schierloh v. Schierloh, 148 N. Y., 103; Leary v. Corvin, 181 N. Y., 222, 226-228.

Time of Payment. The payment must be made at or before the transfer of title, and no trust will result from a subsequent payment. Fessenden v. Taft, 65 N. H., 39; Pain v. Farson, 179 Ill., 185; Reed v. Reed, 135 Ill., 482; Niver v. Crane, 98 N. Y., 40.

This is true although the payment is the result of a prior oral agreement that the party seeking to establish the trust shall pay an obligation given at the time of taking title, in which both parties join. Jacksonville National Bank v. Beasley, 159 Ill., 120.

In general the time must be that of actual conveyance, Goelz v. Goelz, 157 Ill., at p. 45, but it has been held that payment may be made prior to the actual conveyance. Gaynor v. Quin, 212 Pa. St., 362.

How Payment Made. Payment need not be made in cash. It is sufficient if an obligation is given. Bibb v. Hunter, 79 Ala., 351.

Loan by Grantee. Sometimes the payment is actually made by the party in whose name title is taken, but with the intent that such payment shall be considered a loan to the party seeking to establish the trust, title being taken in the name of the lender as security. If that fact can be established equity will declare a resulting trust, and decree a conveyance on payment of the loan. Boyd v. McLean, 1 Johns. Ch., 582; Scott v. Beach, 172 Ill., 273.

Loan to Grantee. Where it can be shown that the payment was intended by the parties as a loan to the grantee, the

presumption that a trust was intended is rebutted, and no trust will be raised. Walsh v. McBride, 72 Md., 45, 57-60.

Advancement. Where the party paying the consideration stands in the relation of parent or husband to the party in whose name title is taken, equity will presume that an advancement was intended, and will not raise a trust. Such presumption may, however, be rebutted. Dyer v. Dyer, 2 Cox, 92, 1 White & Tudor (14th Am. Ed.), 314; Smithsonian Inst. v. Meech, 169 U. S., 398-411; Dana v. Dana, 154 Mass., 491; Hallenbeck v. Rogers, 57 N. J. Eq., 199, 220.

Where children pay purchase money of land taking title in the name of a parent, the presumption of an advancement will not arise. Champlin v. Champlin, 136 Ill., 309, 313. Nor is there any presumption of an advancement between sister and brother. Ward v. Ward, 59 Conn., 188.

New York Rule. Resulting trusts of the first class in real property have been abolished by statute in New York. Real Property Law, Sec. 94; Everett v. Everett, 48 N. Y., 218, 222. If, however, the title be taken in the name of the grantee without the knowledge or consent of the person paying the consideration, the statute does not apply. Reitz v. Reitz, 80 N. Y., 538.

So where it would work a fraud to allow the grantee to take advantage of the statute, the court will raise a trust. Jeremiah v. Pitcher, 26 App. Div., 402, 406, affd., 163 N. Y., 574; Church of St. Stanislaus v. Algemeine Verein, 31 App. Div., 133, affd., 164 N. Y., 606. In such cases, however, the trust is a constructive trust, arising out of fraud, actual or presumptive, and the payment of the purchase money constitutes merely one of several circumstances tending to show fraud.

The statute does not apply to personal property. Hence, if the grantee execute the trust, so that the real property becomes transmuted into personalty, the statute no longer applies. Robbins v. Robbins, 89 N. Y., 251; Bork v. Martin, 132 N. Y., 280, 286.

Real property of a partnership in deemed personalty; and, hence, where a partnership buys real property with partnership funds, and title is taken in the name of one member of the firm, he will hold the title in trust for the firm. Fairchild v. Fairchild, 64 N. Y., 471.

The trust provided for creditors of the person paying the purchase money is not the old resulting trust, excepted from the operation of the statute for their benefit, but is an entirely new trust, in which they are the direct *cestuis que trust* of the grantee. The person paying the purchase money has no interest whatever. Garfield v. Hatmaker, 15 N. Y., 475.

Such a trust will not be raised for the benefit of a wife claiming an inchoate right of dower. Phelps v. Phelps, 143 N. Y., 197, 201.

2. Purchase With Fiduciary Funds.

Where a person in possession of funds of another either as agent, trustee or in any other relation of a fiduciary character, invests such funds in real property, taking title in his own name, a trust will result in favor of the person beneficially entitled to the fund. Day v. Roth, 18 N. Y., 448, 455; Sholty v. Sholty, 140 Ill., 81; Goodwin v. Colwell, 213 Pa. St., 614; Wolfe v. Citizens' Bank, 42 S. W. (Tenn.), 39-42.

It is possible that if title were taken in the name of the fiduciary with the assent of the beneficial owner of the fund, the statute in New York might in some cases prevent a trust from arising, but not if so taken in violation of a trust. Real Property Law, Sec. 94, Subd. 2.

3. Voluntary Conveyance.

Prior to the statute of uses, if a feoffment was made without consideration and without a use being declared to the feoffee or any other person, the use resulted to the feoffor. This resulting use is now preserved, in name at least, in this third class of resulting trusts. For a discussion of this subject see, 1 Perry on Trusts, Secs. 161-165.

Such trusts are very rare as in almost all modern conveyances the use is declared, and where that is the case absence of consideration will not cause a trust to result to the grantor. Lovett v. Taylor, 54 N. J. Eq., 311; Gove v. Learoyd, 140 Mass., 524. See also, Fitzgerald v. Fitzgerald, 168 Mass., 488; Kellogg v. Western El. Mfg. Co., 168 Ill., 240.

Absence of consideration in connection with other circumstances may be sufficient to raise a constructive trust, which will be considered below.

4. Where Property is Given in Trust, but No Trust is Declared or if Declared Cannot Be Carried Out.

Where property is given to certain persons upon trust, and the trust is not declared at all, or is not declared sufficiently to be enforcible, or is declared only as to part of the property, or fails, or is illegal or otherwise void, a trust results to those persons who but for the trust would have been entitled to the property. 1 Perry on Trusts, Secs. 150-160a; Morice v. The Bishop of Durham, 10 Ves., 522, Ames' Cases on Trusts, 195-197, 200; Wood v. Keyes, 8 Paige's Ch., 365; Hopkins v. Grimshaw, 165 U. S., 342, 353-357; St. Paul's Church v. Attorney General, 164 Mass., 188, 197, 200.

B. Constructive Trusts.

Constructive trusts are defined under the head of Classification, *ante*. They are divided into two classes, those which are based on fraud, or trusts *ex maleficio*, and those which are not based on fraud.

1. Constructive Trusts Based on Fraud.

One of the chief functions of a court of equity is to relieve against fraud. If by means of fraud a person has obtained title to or an interest in property, equity will declare him a trustee of such title or interest for the benefit of the person defrauded, and decree a conveyance. Fraud is of two kinds, actual and presumptive. Constructive trusts based on fraud

may, therefore, be divided into two classes, those based on actual fraud and those based on presumptive fraud.

a. Constructive Trusts Based on Actual Fraud.

In General. To move a court of equity to raise a constructive trust out of actual fraud, it is necessary, according to a recent writer, to prove all the elements of fraud required to sustain an action of deceit at law, viz.: "that the defendant made a representation which in spirit and essence was false, and that he did so either by expressing an untruth (*expressio falsi*) or by suppressing the truth (*suppressio veri*), as by remaining silent when it was his duty to speak; that he made such representation with wrongful and fraudulent intent, which fact may be proved by showing that he knew or believed it to be false, or that he was aware that he did not know whether it was true or false, or that although he believed it to be true he had no reasonable ground for the belief and so his belief can not be said to be honest; that he made it with intent that it should be acted on, or with reasonable ground to believe that it would be acted on; that it was acted on by the complainant, who under the circumstances was justified as a reasonable person in so acting; that the statement was material—a substantial moving cause of the complainant's conduct, and it has caused pecuniary damage as a proximate result, or will do so unless the relief prayed for—the establishment of a constructive trust and the consequent disposition of the property—is granted by the court." 1 Reeves on Real Property, Sec. 376.

Misrepresentation. The following are instances of constructive trusts based on actual fraud consisting of misrepresentation of a material fact: Tyler v. Black, 13 How. (U. S.), 230; Jones v. Van Doren, 130 U. S., 684, 691; Bacon v. Bronson, 7 John. Ch., 194; Winans v. Huyck, 32 N. W. (Iowa), 422.

Fraudulent Promise. Promises made with intent not to perform have been treated by the courts in some instances as actual fraud. A court of equity will not, under the guise of

a constructive trust, enforce a mere oral promise, void b the statute of frauds, but equity will not permit the statut to be made a cloak for fraud, and if one person has obtaine title to property of another, or in which another has an inte est, "by means of an intentionally false and fraudulent verb promise" to hold or dispose of it for a particular purpos equity will not permit him to retain the property and repudiat the promise, but will declare him a trustee. Ryan v. Dox, 3 N. Y., 307; Herschel v. Mamero, 120 Ill., 660; Gregory v. Bowl by, 88 N. W. (Iowa), 822.

But where there is a mere oral promise, without any previou interest on the part of the promisee in the subject, equit will not raise a constructive trust as a remedy for the breac of such promise. Emerson v. Galloupe, 158 Mass., 146; Lev v. Brush, 45 N. Y., 589.

Even where there was a previous interest in the propert but the plaintiff surrendered no right on the faith of th promise, it was held that there was no fraud. Wheeler Reynolds, 66 N. Y., 227, 233.

Devise or Bequest Obtained or Prevented by Fraudule Promise. In like manner where a person by means of suc a promise obtains a devise or bequest to himself or preven a devise or bequest to another, and thereby obtains title t property, equity will not allow him to retain the propert beneficially, but will hold him as a constructive trustee. O'H ra v. Dudley, 95 N. Y., 403; Trustees of Amherst College Ritch, 151 N. Y., 282, 322-328; Dowd v. Tucker, 41 Conn., 19

Duress, Undue Influence and Mistake. While these do nc strictly speaking, involve the element of misrepresentatio they are so nearly related to actual fraud that constructi trusts arising out of them are usually classed with those ari ing out of actual fraud.

The following are instances of duress and undue influenc Eadie v. Slimmon, 26 N. Y., 9; Adams v. Irving Nat. Ban 116 N. Y., 606.

Equity will also relieve against a mistake of fact by decla

ing a constructive trust. Widdicombe v. Childers, 124 U. S., 400; Short v. Currier, 153 Mass., 182.

Equity will rarely relieve against a mistake of law, unless added to the fact of mistake there are other circumstances, as for example, that the parties do not deal on an equal footing, or there is a confidential relation, or some undue influence exercised. In such a case the mistake of law may more properly be said to constitute an element of presumptive fraud. The following are instances: Haviland v. Willets, 141 N. Y., 35, 50-51; Clark v. Clark, 42 At. Rep. (N. J.), 98.

Equity will raise a constructive trust where it is necessary in order to make restitution to the owner of stolen property. Newton v. Porter, 69 N. Y., 133.

b. Constructive Trusts Based on Presumptive Fraud.

Presumptive fraud may be of three kinds; (1) "fraud presumed from the intrinsic nature of the transaction"; (2) "fraud presumed from the relations of the parties to the transaction"; (3) "fraud presumed or declared to exist as affecting third parties." 1 Reeves on Real Property, Sec. 379; Chesterfield v. Janssen, 1 Atk., 301, 1 White & Tudor, *541, at *p. 585.

A[1]. Constructive Trusts Based on Fraud Presumed from the Intrinsic Nature of the Transaction.

Inadequacy of Consideration. While inadequacy of consideration has been laid down by some judges and writers as a circumstance from which fraud might be presumed, it may be stated that at the present day it does not of itself furnish a sufficient basis for such presumption, except possibly in rare instances of great inequality. Eyre v. Potter, 15 How. (U. S.), 42, 59; Dunn v. Chambers, 4 Barb., 376; 1 Story's Equity, Secs. 244-246; 1 Perry on Trusts, Sec. 187. There are cases, however, in which the courts seem to recognize that under certain circumstances mere inadequacy of consideration, if very great, will constitute *prima facie* evidence of fraud, and

call upon the transferee to make an explanation. Johnson v. Woodworth, 134 App. Div., 157; Byers v. Surget, 19 How. (U. S.), 303, 311.

And inadequacy of consideration coupled with other circumstances may be sufficient to make out a case of presumptive fraud. Allore v. Jewell, 94 U. S., 506, 511.

Sale by Heir of Expectancy. The sale by an heir of an expectancy is presumptively fraudulent, and the burden is cast upon the transferee of showing its fairness. If he can do so, it will be supported, but not otherwise. Some American cases require also the assent of the ancestor. *In re* Kuhns' Est., 163 Pa. St., 438; McClure v. Raben, 125 Ind., 139; S. C., 133 Ind., 507; Jenkens v. Pye, 12 Peters, at p. 256; 1 Perry on Trusts, Sec. 188. For a review of early authorities on this subject, see, Varick v. Edwards, Hoffman's Ch., 382, 395-403.

B[1]. Constructive Trusts Based on Fraud Presumed from the Relations of the Parties.

Trusts of this character may be divided into two classes: (1) when a person in some fiduciary position deals with the subject of the trust, or in respect thereto, and (2) where a person who occupies a fiduciary relationship toward another deals with that other and thereby obtains an unconscionable advantage. The fiduciary relationship here contemplated is not confined to fiduciary relationships, strictly so called, but includes any relationship whereby the parties deal on an unequal footing, so that the one obtaining the advantage is under a duty to exercise good faith toward the other.

a[1]. Fiduciary Dealing with or in Respect to Subject of Trust.

In General. Equity will not permit a person who occupies a fiduciary relation toward another to deal with or in respect to the subject of that relation for his own benefit. Such relation need not be the technical relation of trustee and *cestui que trust*, but the rule applies to all relations of a fiduciary character of which property is the subject.

Fiduciary Acquiring Outstanding Interest. Accordingly, if a fiduciary acquires from a third person an interest in the property which forms the subject of the relation, equity will declare him a trustee of such interest at the instance of the beneficiary. Keech v. Sandford, 1 White & Tudor, *44; Mitchell v. Reed, 61 N. Y., 123; Trice v. Comstock, 121 Fed. Rep., 620.

Fiduciary Acquiring Subject of Relation. Likewise if the fiduciary obtains title to the trust property itself, as by purchasing the same directly or indirectly at public or private sale, or in any other manner, equity will, at the option of the beneficiary, and without regard to the adequacy or inadequacy of the price paid, set aside the transaction, and declare a constructive trust. Gardner v. Ogden, 22 N. Y., 327; Case v. Carroll, 35 N. Y., 385; Nichols v. Riley, 118 App. Div., 404; People v. Open Board of Stock Brokers' Building Co., 92 N. Y., 98; Johnson v. Haywood, 103 N. W. (Neb.), 1058. But see, Allen v. Gillette, 127 U. S., 589; Herr v. Payson, 157 Ill., 244.

The property purchased need not be the direct subject of the fiduciary relation, if the transaction tend to reduce the property which is the subject. Fulton v. Whitney, 66 N. Y., 548.

In cases where a trustee empowered to sell property has a beneficial interest in the same to protect, he may obtain leave of court to purchase the same. Scholle v. Scholle, 101 N. Y., 167. The purchase is not void, but merely voidable, and may be confirmed by the court, but a mere formal confirmation of the sale is not sufficient unless all the parties in interest and the equities between them are before the court. Fulton v. Whitney, *supra*; Corbin v. Baker, 167 N. Y., 128. See also, Boyer v. East, 161 N. Y., 580. So the transaction may be confirmed by lapse of time. Kahn v. Chapin, 152 N. Y., 305.

Tenants in Common as Fiduciaries. It has been held that tenants in common stand in such a fiduciary relation to each other with respect to the common property as to come within the rules above stated. Ryason v. Dunten, 164 Ind., 85, 90-92. There are exceptions, however, as where the cotenant so

purchasing has acquired his interest from the assignee in bankruptcy of one of the original cotenants. Elston v. Piggott, 94 Ind., 14, 25-28. See, Carpenter v. Carpenter, 131 N. Y., 101.

b[1]. Fiduciary Dealing with Other Party to Fiduciary Relationship.

In General. Where two parties stand on an unequal footing, from whatever cause, equity requires that in all dealings between them the stronger or the one in the more influential position shall observe the utmost good faith, and unless he does so any transfer of property which he may obtain from the other party will be set aside at the latter's instance. If the relationship is that of trustee and *cestui que trust*, guardian and ward, or attorney and client, any such transfer of property will be presumed to be fraudulent, and will be set aside, unless the trustee, guardian or attorney is able to show affirmatively that the transaction was perfectly fair, that the other party acted freely, with full knowledge of his rights, and without any constraint or undue influence, and perhaps, also, on independent advice. If, however, the relation is that of parent and child, husband and wife, or some other less close relation, additional facts must be shown in order to raise the presumption of fraud or undue influence, but the facts need not be such as would be necessary to prove actual fraud. They need be sufficient only to raise a suspicion, and the closer and more confidential the relationship, the weaker the proof which is necessary to raise the presumption of fraud. The confidential relationship and facts sufficient to raise a suspicion of fraud being shown, the burden will then be cast upon the fiduciary, as he may for convenience be called, to show the entire fairness of the transaction, and the absence of any fraud or undue influence. The same rules apply where one of the parties is subject to mental weakness, drunkenness or great distress, or where for any other reason, the parties do not deal upon an equal footing. 1 Reeves on Real Property, Secs. 383-385.

The property acquired by the fiduciary need not be the subject of the pre-existing fiduciary relationship, nor need such relationship pertain to property.

Fraud Presumed From Relationship Alone. The following cases are instances of those in which the relationship alone raises the presumption of fraud:

Trustee and *cestui que trust* (including also an executor or administrator and a person entitled to share in the estate). Adams v. Cowen, 177 U. S., 471, 482; State v. Culhane, 78 Conn., 622; Bushe v. Wright, 118 App. Div., 368, affd., 195 N. Y., 510.

Guardian and ward. McParland v. Larkin, 155 Ill., 84-89.

Attorney and client. Nesbit v. Lockman, 34 N. Y., 167.

Fraud Presumed From Relationship and Additional Circumstances. The following cases are instances of those in which the relationship alone is insufficient, and additional circumstances must be shown:

Parent and child. Wood v. Rabe, 96 N. Y., 414; Goldsmith v. Goldsmith, 145 N. Y., 313; Jeremiah v. Pitcher, 26 App. Div., 402, affd., 163 N. Y., 574; Leary v. Corvin, 181 N. Y., 222, 228; Stahl v. Stahl, 214 Ill., 131.

Husband and wife. Ahrens v. Jones, 169 N. Y., 555; Lamb v. Lamb, 18 App. Div., 250; Larman v. Knight, 140 Ill., 232.

Brothers, or brother and sister. Beadle v. Beadle, 40 Fed. R., 315, 318-321; Odell v. Moss, 137 Cal., 542.

Other confidential relations. Barnard v. Gantz, 140 N. Y., 249; Ingersoll v. Weld, 103 App. Div., 554.

Mental weakness of one party. Allore v. Jewell, 94 U. S., 506; Odell v. Moss, *supra.* Advantageous position by reason of superior knowledge or other circumstances. Haviland v. Willets, 141 N. Y., 35; Clark v. Clark, 42 At. Rep. (N. J.), 98; Troxell v. Silverthorn, 45 N. J. Eq., 330.

No rule can be laid down as to what circumstances in addition to the confidential relation or other inequality of position must be shown in order to raise the presumption of fraud.

Each case must be decided on its own facts. Absence or inadequacy of consideration is, however, usually an element.

Cases coming under this head are often difficult to distinguish from cases of constructive trusts based on fraudulent promises, treated *ante* in connection with constructive trusts based on actual fraud; for an oral promise and failure to perform it are circumstances in most of the cases where fraud is presumed from the relations of the parties. It is believed that the distinction may be briefly stated as follows: where there is no confidential relationship, there must be some proof from which the court can infer that the promise was made with intent not to perform it, to make out a *prima facie* case, Gregory v. Bowlsby, 88 N. W. Rep. (Iowa), 822; but where there is a confidential relationship such proof is not necessary.

C[1]. Constructive Trusts Based on Fraud on Third Parties.

In General. If two parties so deal with each other that one of them acquires title to property which should in equity go to some third party, a court of equity will interfere and declare the person so acquiring title a trustee for the benefit of the third person.

Fraud on Purchasers. Where one person purchases property of another for a valuable consideration, but does not obtain the legal title, and another person, before or after such purchase, obtains the legal title from the same grantor, or by his procurement, without consideration, he will be decreed to hold such legal title in trust for the purchaser for a valuable consideration. In America, however, a voluntary deed is only presumptively fraudulent, as against a subsequent purchaser for a valuable consideration without notice. 1 Reeves on Real Property, Sec. 399; Cathcart v. Robinson, 5 Pet., 264, 279; Moore v. Crawford, 130 U. S., 122, 128-130, 140-142; Ten Eyck v. Witbeck, 135 N. Y., 40.

Fraud on Creditors. Where a debtor transfers his property to prevent his creditors from collecting their debts, the transferee, if participating in the guilty intent, or if the transfer

is voluntary, will in effect be decreed to hold as trustee for the creditors. 1 Reeves on Real Property, Sec. 400; Angle v. Chicago, &c., R. R. Co., 151 U. S., 1; Metcalf v. Moses, 161 N. Y., 587; Matthews v. Thompson, 186 Mass., 14, 19.

Fraud Upon Marital Rights. The voluntary conveyance by one party to a contract to marry and without consent of the other party in order to prevent such other party from acquiring marital rights in the property conveyed, constitutes a fraud on such other party, and the transferee will be declared a trustee. Unless there is a contract to marry between the parties, such a conveyance is not fraudulent however shortly before the marriage it takes place. For a discussion of this subject and instances, see, 1 Reeves on Real Property, Sec. 401; Strathmore v. Bowes, 1 White & Tudor, *405; Youngs v. Carter, 10 Hun, 194; Ferebee v. Pritchard, 112 N. C., 83; Alkire v. Alkire, 134 Ind., 350.

Fraud on Powers. Where a power is conferred upon a person it must be fairly exercised for the purpose for which it is given, and if exercised for another or, as it is called, a *sinister* purpose, the grantee will—unless a bona fide purchaser —be declared a trustee. The following are instances of the improper exercise of powers: Alleyn v. Belchier, 1 White & Tudor, *377; Duke of Portland v. Topham, 11 H. L. C., 32.

Power held properly executed. Jackson v. Veeder, 11 Johns., 169. See, 1 Reeves on Real Property, Sec. 402.

2. Constructive Trusts Not Based on Fraud.

In General. Of trusts of this class it may be said that where equity can promote the ends of justice by raising a trust, it will in general do so. Such trusts may arise out of many situations and relations in which parties may find themselves in dealing with each other.

Vendor and Purchaser. When a valid contract is entered into for the purchase and sale of real property, the vendor becomes a trustee of the legal title for the vendee, and the vendee becomes a trustee of the purchase money for the vendor.

Sutphen v. Fowler, 9 Paige's Ch., 280; Williams v. Hadcock, 145 N. Y., 144, 150.

Contract Relations. So trusts may be raised out of various contractual relations. Johnston v. Spicer, 107 N. Y., 185-196; Vulcan Detinning Co. v. Am. Can Co., 67 At. Rep. (N. J.), 339.

Inappropriate Legal Methods. Where the intention of the parties to a transaction is clear, but they have not adopted an appropriate legal method to effectuate their intention, or where they have attempted to deal with property in a manner which its legal nature does not permit, equity will raise a constructive trust, if by so doing the intention of the parties can be carried out, or justice done between them. Thus, where the grantor in a conveyance of land attempts to reserve easements of light, air and access, or a right to recover damages for their infringement, the reservation is ineffectual, but equity will declare the grantee a trustee of any sum recovered as damages for such infringement. Western Union Telegraph Co. v. Shepard, 169 N. Y., 170; McKenna v. Brooklyn Union Elevated R. R. Co., 184 N. Y., 391.

VIII.

"THE NATURE OF THE CESTUI QUE TRUST'S INTEREST."

A. "His Claim is Purely Equitable, Except When Account Would Lie At Common Law."

In General. Generally speaking the remedy of the *cestui que trust* for a breach of trust is by a suit in equity against his trustee to compel him to perform the trust, and a court of law will not take cognizance of the matter. Norton v. Ray, 139 Mass., 230, Ames' Cases on Trusts, 239; Marvin v. Brooks, 94 N. Y., 71; Husted v. Thompson, 158 N. Y., 328.

Some cases have held that an action on the case would lie for damages for breach of trust. Megod's Case, 4 Leon., 225, Ames' Cases on Trusts, 235, and notes.

Where Amount Liquidated. Where the trust property consists of a liquidated sum of money, and the only duty of the trustee is to presently pay it to the *cestui que trust*, an action at law to recover it will lie. Johnson v. Johnson, 120 Mass., 465; Derome v. Vose, 140 Mass., 575; Roberts v. Ely, 113 N. Y., 128. In such cases courts of law and equity have concurrent jurisdiction. N. Y. Ins. Co. v. Roullet, 24 Wend., 505.

Where Action of Account Lies. The action of account seems to lie in cases of trusts recognized by common law and growing, for the most part, out of various business relations. Anon., Y. B., 6 Hy. IV., fol. 7, pl. 33, Ames' Cases on Trusts, 1, and notes; Paschall v. Keterich, Dyer, 151b, pl. 5, Id. 2, and notes; Harris v. deBervoir, Cro. Jac., 687, Id., 4; Farrington v. Lee, 2 Mod. Rep., 311, Id., 6, and notes. See also, Ames' Cases on Trusts, 240, Note 2.

Equitable Defense in Action at Law. In early times the common law courts would not recognize the rights of the *cestui que trust*, even in an action brought against him by the trustee for ejectment or trespass. Anon., Y. B., 4 Edw. IV.,

fol. 7, pl. 9, Ames' Cases on Trusts, 240; Weakly v. Rogers, 5 East, 138, Id., 241. In such cases an action in equity will lie to restrain the enforcement of the judgment. Johnson v. Christian, 128 U. S., 374, 381.

In many jurisdictions an equitable defense may, by statute, be interposed in an action at law. Ames' Cases on Trusts, 242, Note 1; 7 Encyc. of Pleading and Practice, 800-805; N. Y. Code of Civ. Pro., Sec. 507; Cavalli v. Allen, 57 N. Y., 508-514; Hoppough v. Struble, 60 N. Y., 430.

B. "Cestui Que Trust is a Claimant Against the Trustee—Not the Owner of the Trust-res."

1. "His Claim is Enforceable Regardless of the Situs of the Trust-res."

Land Without the Jurisdiction of the Court. Where the land is without the jurisdiction of the court, the court will nevertheless, on obtaining jurisdiction of the person of the trustee, compel him to perform the trust. Earl of Kildare v. Eustace, 1 Ves., 405, 419, Ames' Cases on Trusts, 244; Sutphen v. Fowler, 9 Paige's Ch., 280; Gardner v. Ogden, 22 N. Y., 327, 332-339.

Property Within Jurisdiction—Trustee Not. Equity acts *in personam* and not *in rem*. Accordingly if personal jurisdiction of the trustee cannot be obtained, the court cannot afford relief, even though the property is within its jurisdiction, unless authorized by statute. Hart v. Sansom, 110 U. S., 151; Felch v. Hooper, 119 Mass., 52, Ames' Cases on Trusts, 246, and notes. The statutory provisions in New York authorizing proceedings *in rem* in such cases are found in the Code of Civil Procedure, being those relating to service by publication and authorizing judgment thereon.

2. "Cestui Que Trust Cannot Proceed Directly Against a Stranger, Either at Law or in Equity."

In General. Where it is necessary to take some legal proceeding against a stranger for the recovery or protection of trust property, it must in general be brought by and on behalf

of the trustee, and the *cestui que trust* cannot proceed directly against such third person. Bailey v. N. E. Mutual Life Ins. Co., 114 Mass., 177, Ames' Cases on Trusts, 256; Morgan v. Kansas Pac. Ry. Co., 15 Fed. Rep., 55, Id., 258; Western R. R. Co. v. Nolan, 48 N. Y., 513-518; Mason v. Mason, 219 Ill., 609.

Where Trustee Refuses. If, however, the trustee, after proper demand, refuses to bring an action, the *cestui que trust* may proceed in equity, joining the trustee and the stranger as defendants. Harvey v. McDonnell, 113 N. Y., 526-531; Anderson v. Daley, 38 App. Div., 505.

Cestui Que Trust in Possession of Real Property. A *cestui que trust* in possession of real property may bring trespass against persons breaking the close. Second Congregational Society v. Waring, 24 Pick. (Mass.), 304.

Cestui Que Trust Not Necessary Party to Trustee's Suit to Recover Trust Property. If the trustee brings an action to recover trust property so that he may apply it to the purposes of the trust, he need not make the *cestui que trust* a party unless an administration of the trust by the court is prayed for. Carey v. Brown, 92 U. S., 171, Ames' Cases on Trusts, 260, and note; Roberts v. N. Y. El. R. R. Co., 155 N. Y., 31, 38. See also, Matter of Straut, 126 N. Y., 201; Wetmore v. Porter, 92 N. Y., 76, Ames' Cases on Trusts, 262.

Suits against Trustee. In suits by a stranger against the trustee to defeat the trust, the *cestui que trust* is not a necessary party, if the trustee's powers are such that he is authorized to represent and bind the beneficiary. Kerrison v. Stewart, 93 U. S., 155; Vetterlein v. Barnes, 124 U. S., 169. But where any interest of the beneficiary as to which the trustee does not represent him is affected, the beneficiary must be a party. Northampton Nat. Bk. v. Crafts, 145 Mass., 444; Brokaw v. Brokaw, 41 N. J. Eq., 215.

3. "A Cestui Que Trust of an Obligation Cannot Discharge the Obligor."

In General. Where the subject of the trust is an obligation, the trustee alone has power to discharge it and not the *cestui que trust.* Parker v. Tennant, Jenkins, Century Cases, 221, pl. 75, Ames' Cases on Trusts, 266; Anon., Dalison, 38, pl. 6, Id. 266. See also, Crosby v. Bowery Savings Bank, 50 N. Y. Super., 453.

In cases, however, where the trustee is in effect merely a naked or dry trustee, a discharge by the beneficiary, having the whole equitable interest, will be good in equity. Ames' Cases on Trusts, 266, Note 2; Pratt v. Dow, 56 Me., 81; Mc Bride v. Wright, 46 Mich., 265; Galt v. Smith, 145 Pa. St., 167; and see, Bizzell v. McKinnon, 121 N. C., 186, 189.

Payment to the trustee discharges the obligor. Gibson v. Winter, 2 L. J., N. S., K. B., 130, Ames' Cases on Trusts, 267. And it has been held that an active trustee has power to compromise a claim in favor of the trust estate. Allen v. Randolph, 4 John. Ch., 693.

Application of Purchase Money. A person buying trust property is no longer obliged to see to the application of the purchase money. Ames' Cases on Trusts, 269, Note. But see, 28 Am. and Eng. Encyc. of Law, 2nd. Ed., 1125.

Set-Off. For the rules as to set off, see, Ames' Cases on Trusts, 270, Note; N. Y. Code of Civil Procedure, Sec. 502, Subd. 3.

4. "When Cestui Que Trust's Interest in the Trust-res is Forfeited by the Trustee's Laches."

If the trustee fails to take proper steps to protect or recover trust property, and his right to do so becomes lost by reason of the statute of limitations or otherwise, the *cestui que trust* cannot afterward takes steps on his own account. Wych v. East India Co., 3 P. Wms., 309, Ames' Cases on Trusts, 271; Lloyd's Banking Co. v. Jones, 29 Ch. D., 221, Id., 272; Meeks v. Olpherts, 100 U. S., 564; Waterman Hall v. Waterman, 220 Ill., 569, 575.

5. "Cestui Que Trust Cannot Vote as Owner of the Res."

Where the trust property consists of corporate stock, the trustee and not the *cestui que trust* is the proper person to vote at meetings of stockholders. Matter of Barker, 6 Wend., 509, Ames' Cases on Trusts, 275.

6. "The Burdens Incident to Ownership Fall Upon the Trustee, and Not Upon the Cestui Que Trust."

The trustee is liable for taxes assessed on the trust estate, and personalty must be assessed where he resides and not where the *cestui que trust* resides. Latrobe v. Baltimore, 19 Md., 13, Ames' Cases on Trusts, 278; People ex rel. Kellogg v. Wells, 182 N. Y., 314.

The trustee is liable personally and not in his representative capacity for damages for injuries resulting from the defective condition of premises constituting trust property. Keating v. Steveson, 21 App. Div., 604; Miniot v. Jackson, 40 Misc., 197. But see, Prinz v. Lucas, 210 Pa. St., 620.

The trustee is also in general personally liable upon a contract made by him for repairs on premises constituting trust property. In certain cases, however, he may pledge the trust estate. O'Brien v. Jackson, 167 N. Y., 31.

New York Rule. In New York the interest taken by the *cestui que trust* of an express trust in lands is governed by statute. Real Property Law, Sec. 100. This was revised from 1 R. S., 729, Sec. 60, which provided that the trustee should have the whole estate "in law and in equity," and that the beneficiary should take no estate or interest. Whether the present statute, which provides in substance that the *legal* estate vests in the trustee and that the beneficiary takes no *legal* estate or interest in the property, has revived the idea that the beneficiary has an equitable estate is of little practical importance; his rights are substantially the same in either case.

This statute does not apply to implied trusts, and they are still governed by common law. Of such a trust and of passive trusts generally, wherever they now exist, it seems, perhaps, more reasonable to say that the *cestui que trust* is owner of an equitable estate, rather than a claimant against the trustee. In Cavalli v. Allen (57 N. Y., 508), Commissioner Dwight said, "He [a purchaser of real property after the execution of the contract] was owner of an equitable estate in fee," and added that he might, out of that, carve "smaller derivative estates to sub-purchasers." See also, 3 Pomeroy's Equity Jurisprudence, 3rd Ed., Sec. 988. The distinction is, however, as stated above, one of little, if any, practical importance.

IX.

"THE TRANSFER OF TRUST PROPERTY."

A. "By Act of the Party."

1. "By Act of the Trustee."

General Doctrine. Where the trustee, in violation of the trust, transfers trust property to a third person, the *cestui que trust* can follow it and recover it from such third person, or any subsequent transferee, so long as he can identify it, unless it comes into the hands of a purchaser for value and without notice of the trust. Am. Sugar Ref. Co. v. Fancher, 145 N. Y., 552, 556-557; Flitcraft v. Com. Title Ins. & Trust Co., 211 Pa. St., 114.

But if the legal title comes into the hands of a *bona fide* purchaser, the right of the *cestui que trust* is gone. Valentine v. Lunt, 115 N. Y., 496.

Priorities Between Equities. Where two claimants of property stand on an equal footing so far as their equitable claims are concerned, equity will first look to see if either holds the legal title, and if so will award the property to him on the maxim, "Where the equities are equal the law will prevail." The equities between a *cestui que trust* and a *bona fide* purchaser of trust property are considered equal, and accordingly if such purchaser has acquired the legal title he will prevail. Williams v. Jackson, 107 U. S., 478; Dunlop v. Avery, 89 N. Y., 592.

If, however, the legal title is not found in either claimant, the maxim, "Where the equities are equal, he who is prior in time is superior in right," will apply. If, therefore, a *bona fide* purchaser of trust property from the trustee acquires only an equitable interest, the *cestui que trust* will prevail. Eyre v. Burmester, 10 H. L. C., 90, Ames' Cases on Trusts, 306; Grimstone v. Carter, 3 Paige's Ch., 421; Cave v. Mackensie, 46 L. J. Ch., 564, Ames Cases on Trusts, 308.

A difficult question arises when the purchaser, having acquired from the trustee an equitable interest for value and without notice, then receives notice and afterwards gets in the legal title. The rule seems to be that if he gets in the legal estate even after suit brought from one who can convey it to him without committing a breach of trust, it will avail him. Bates v. Johnson, Johns., 304, Ames' Cases on Trusts, 292; Dodds v. Hills, 2 H. & M., 424, Id., 297. See also, Leitch v. Wells, 48 N. Y., 585.

Where, however, the subsequent equitable claimant knew before he acquired the legal title that the holder committed a breach of trust in conveying it to him, the legal title will not protect him, and perhaps also where the holder of the legal title knew that he committed a breach of trust when he made the conveyance, although the subsequent equitable claimant may not have had notice thereof. Saunders v. Dehew, 2 Vern., 271, Ames' Cases on Trusts, 289, and notes; Grimstone v. Carter, *supra*; Shropshire &c., Ry. Co. v. The Queen, L. R., 7 H. L., 496, Ames' Cases on Trusts, 300.

Where the equities are not equal he who has the better equity will prevail, as where the subsequent purchaser is a volunteer or acquired his equitable interest with notice of the prior interest. Sometimes a priority is allowed between an equitable interest and an equity, such, for example, as a mere right to set aside a conveyance for fraud. Cave v. Cave, 15 Ch. D., 639, Ames' Cases on Trusts, 311.

Notice. What constitutes sufficient notice to affect a purchaser of trust property is a question of fact in each case. It need not be actual notice, but it is sufficient if it puts him upon inquiry. National Bank v. Insurance Co., 104 U. S., 54; Union Stock Yards Bank v. Gillespie, 137 U. S., 411; Kirsch v. Tozier, 143 N. Y., 390. Where the trust affects personal property, the pendency of a suit in equity—no complaint having been filed —is not notice. Leitch v. Wells, 48 N. Y., 585, 601. Possession is usually notice. Grimstone v. Carter, 3 Paige's Ch., 421; Seymour v. McKinstry, 106 N. Y., 230. But see, Cornell v. Maltby, 165 N. Y., 557. Notice to an agent is usually notice

to his principal, but may not be where the agent is acting in his own interest. Benedict v. Arnoux, 154 N. Y., 715, 718. Where the property passes into the hands of a *bona fide* purchaser, he can give a good title to one affected with notice, but not if that person is a former holder of the legal title charged with notice. Clark v. McNeal, 114 N. Y., 287.

Consideration. The only question which need be discussed under this head is whether an antecedent debt constitutes sufficient consideration. Different rules prevail in different jurisdictions. 23 Am. & Eng. Encyc. of Law, 2nd Ed., 490, *et seq*; Bay v. Coddington, 5 Johns. Ch., 54; Coddington v. Bay, 20 Johns., 637; Goodwin v. Mass. Loan, &c. Co., 152 Mass., 189, 198-200; Gest v. Packwood, 34 Fed. Rep., 368.

Identification of Property.. Where the trustee in violation of the trust transfers property to another, the beneficiary must be able to identify it in order to follow it. It may have been entirely changed in its character and mingled with other property, but if he can trace it into any fund, investment, or specific property of any description, he will be entitled to the whole of such property (if it consists entirely of the proceeds of the trust property), or to a lien thereon to the extent of his interest. Green v. Given, 33 N. Y., 343, 358-367; Holmes v. Gilman, 138 N. Y., 369; National Bank v. Insurance Co., 104 U. S., 54; Union Stock Yards Bank v. Gillespie, 137 U. S., 411.

The greatest difficulty arises in cases where the trust fund in the form of money has been mingled with the money of the trustee, and the trustee is insolvent. Then the question is whether the beneficiary is entitled to preferential payment, on the ground that he is able to follow the trust fund into the assets, or whether he must come in with the general creditors for his *pro rata* share of the general assets. The following propositions state, it is believed, the rules supported by the weight of authority:

1. If the trustee deposits the trust fund in a bank account kept in his own name, in which he deposits also his own money,

and from which he draws from time to time for his own purposes, and it appears that from the time of the deposit of the trust funds until the happening of the event which fixes the rights of the parties, as the death of the trustee, an assignment for creditors, or bankruptcy, the bank account has not been reduced below the amount of the trust moneys, the beneficiary will be entitled to receive the entire amount of the trust fund, in preference to the general creditors, upon the theory that the drawings of the trustee for his own purposes will be attributed to his own moneys, and not to the trust funds, without regard to the order in which the deposits have been made. Knatchbull v. Hallet, 13 Ch. D., 696, distinguishing Clayton's case, 1 Merivale, 572, in which it was held that the first drawings out should be attributed to the first payments in; Importers and Traders' National Bank v. Peters, 123 N. Y., 272; Heidelbach v. National Park Bank, 87 Hun, 117; Blair v. Hill, 50 App. Div., 33, affd., 165 N. Y., 672.

2. A similar rule is applicable also where the trust money, instead of being deposited with other money in a bank account, is commingled with the trustee's own money in a mass of currency; and in such case all withdrawals for the trustee's individual purposes will be attributed to his own money. Continental Bank v. Weems, 69 Tex., 489; Arnot v. Bingham, 55 Hun, 553; People v. Merchants' Bank, 92 Hun, 159; Piano Mfg. Co. v. Auld, 14 So. Dak., 512; Massey v. Fisher, 62 Fed. Rep., 958; Merchants' National Bank v. School Dist., 94 Fed. Rep., 705; Richardson v. N. O. Debenture Redemption Co., 102 Fed. Rep., 780; Sherwood v. Central Michigan Savings Bank, 103 Mich., 109. *Contra*: Philadelphia National Bank v. Dowd, 38 Fed. Rep., 172; Frank v. Bingham, 58 Hun, 580.

3. If the account or mass composed of the mingled funds becomes reduced below the amount of the trust moneys, subsequent deposits by the trustee of his own money cannot be applied to make up the deficit, and the beneficiary will be entitled to preferential payment only up to the lowest amount continuously remaining in the account or mass, from the time of the deposit of the trust fund until the event which fixes

the rights of the parties. Arnot v. Bingham, 55 Hun, 553; Heidelbach v. National Park Bank, 87 Hun, 117; Importers and Traders' National Bank v. Peters, 21 N. Y. St. Rep., 98, 102, affd., 123 N. Y., 272; Mercantile Trust Co. v. St. L. & S. F. Ry. Co., 99 Fed. Rep., 485; In re Mulligan, 116 Fed. Rep., 715.

4. The rule as to subsequent deposits is otherwise, however, where the mingled funds are deposited in an account kept in the name of the trustee (or other fiduciary) as such. In that event, if the account be drawn down below the amount of the trust fund, subsequent deposits of the trustee's own money will be deemed appropriated to the trust. Cohnfeld v. Tanenbaum, 176 N. Y., 126; United National Bank v. Weatherby, 70 App. Div., 279. So where a fiduciary opens an account as such the moneys deposited therein are deemed appropriated to the trust, up to the amount of the trust fund. Baker v. N. Y. National Exchange Bank, 100 N. Y., 31. The same rule would undoubtedly apply if the moneys were kept in currency in a receptacle exclusively devoted to the uses of the trust.

5. If there are several trust creditors whose moneys have been mingled with the trustee's own money in a single deposit or mass, and not enough of the trust funds, as ascertained by the rules already stated, remains to pay all the trust creditors in full, there seems to be no definite rule of distribution. Three methods of distribution are possible, *In re* Mulligan, 116 Fed., 715,—(1) pro rata among the trust creditors, (2) according to the rule in Clayton's Case, 1 Merivale, 572, attributing the first drawings out to the first payments in, thus giving the trust creditor whose money *last* went into the commingled fund, the *first* lien thereon, (3) rejecting all claims to preferential payment, and requiring the trust creditors to come in with the general creditors. The last method was adopted in In re Mulligan, *supra*. The first method was employed in Piano Mfg. Co. v. Auld, 14 So. Dak., 512. This seems the most nearly just rule.

6. Where the trust money is not traced into any particular fund, investment or property, some cases hold that the bene-

ficiary is entitled to preferential payment if he can show merely that it passed into the hands of the trustee, although he does not show what has become of it afterward, on the ground that it must have gone to swell the estate. People v. Bank of Dansville, 39 Hun, 187; Peak v. Ellicott, 30 Kan., 156; Harrison v. Smith, 83 Mo., 210. This rule is not, however, supported by the weight of authority.

7. Other cases seem to indicate that some particular fund, property or investment must be pointed out, into which the trust moneys have gone. Little v. Chadwick, 151 Mass., 109; Burnham v. Barth, 89 Wis., 362; In re Mulligan, 116 Fed. Rep., 715; Cushman v. Goodwin, 95 Me., 353; Ellicott v. Kuhl, 60 N. J. Eq., 333.

8. The true rule seems to be that the beneficiary need not point out any particular fund, property or investment, but that he must show, not only that the trust money has come into the trustee's hands, but also that it has remained in his hands until his assignment, bankruptcy, death, or other event fixing the rights of the parties, and that it constitutes in some form part of the general assets in the hands of the liquidator —or to put it otherwise, that it has gone to swell the fund distributable to the general creditors. If the beneficiary can show that, he will be entitled to preferential payment in whatever amount he can show that the general assets have been swelled by the trust fund. Matter of Cavin v. Gleason, 105 N. Y., 256, 262-3, *semble*; Matter of Holmes, 37 App. Div., 15, affd., 159 N. Y., 532; Quin v. Earle, 95 Fed. Rep., 728, 731, *semble*; City Bank v. Blackmore, 75 Fed. Rep., 771, *semble*.

The doctrine stated in paragraph 6 in discredited by all the better authorities. Peters v. Bain, 133 U. S., 670, 693; Matter of Cavin v. Gleason, *supra*; Quin v. Earle, 95 Fed. Rep., 728; Nonotuck Silk Co. v. Flanders, 87 Wis., 237, overruling McLeod v. Evans, 66 Wis., 401; Lincoln v. Morrison, 64 Neb., 822; overruling Capital National Bank v. Coldwater National Bank, 49 Neb., 786.

9. Where it is shown that the trust money has been used to pay individual debts of the trustee, it is apparent that the

assets distributable among the remaining general creditors are swelled only by the amount of the dividends which would otherwise have been paid to those general creditors paid off with the trust money. The claim of the trust creditor is, of course, equal to the amount of general indebtedness so paid off; hence the amount he would receive as a dividend as a general creditor is exactly equal to the amount he could reclaim as belonging to the trust, and in such cases he is required, therefore, to come in with the general creditors. Matter of Cavin v. Gleason, 105 N. Y., 256; Warren Scharf Paving Co. v. Dunn, 8 App. Div., 205; City Bank v. Blackmore, 75 Fed. Rep., 771; Quin v. Earle, 95 Fed. Rep., 728; Thuemmler v. Barth, 89 Wis., 381.

10. It is obvious that where the trust money has been squandered, it does not go to swell the assets, and, therefore, the trust creditor can have no preference.

2. "By Act of the Cestui Que Trust."

Priority of Equities. Where a *cestui que trust* assigns his interest in the trust property to two or more successive *bona fide* purchasers, the one who receives the first assignment will in general have the better right on the maxim, "Where the equities are equal, he who is prior in time is superior in right," for neither has the legal title. Phillips v. Phillips, 4 DeG., F. & J., 208, Ames' Cases on Trusts, 331.

If, however, notice of the first assignment is not given to the trustee, and the second assignee before purchasing makes inquiry of the trustee, and then gives notice before the first assignee, some cases have held that the second assignee will prevail, and the same rule applies even if he fails to make inquiry. Dearle v. Hall, 3 Russ., 48, Ames' Cases on Trusts, 323, and notes; Parks v. Innes, 33 Barb., 37.* See also, Bridge v. Conn. Mutual Life Ins. Co., 152 Mass., 343.

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* In New York between successive assignees of a chose in action, the first assignee has the superior right whichever one first notifies the debtor. Greentree vs. Rosenstock, 61 N. Y., 583, 593; Williams vs. Ingersoll, 89 N. Y., 508, 523; Fairbanks vs. Sargent, 104 N. Y., 108, 118.

Where the subsequent *bona fide* purchaser from the *cestui que trust* holds the legal title, as where he is the trustee, he will have the better right, on the maxim, "Where the equities are equal, the law will prevail." Newman v. Newman, 28 Ch. D., 674, Ames' Cases on Trusts, 335.

Notice. The rules as to notice are the same as in case of transfer by the trustee. A question arises under recording acts, however, in cases where the interest of the *cestui que trust* does not appear of record. In such a case if he conveys his interest, and the conveyance is recorded, it does not constitute constructive notice to a subsequent *bona fide* purchaser of the legal title from the trustee, although it would be notice to any subsequent purchaser of the equitable interest from the *cestui que trust.* Tarbell v. West, 86 N. Y., 280-289.

B. "By Death."

1. "Death of the Trustee."

At Common Law. Trustees are usually joint tenants and survivorship obtains among them. 1 Perry on Trusts, Sec. 343; Peter v. Beverly, 10 Pet., 532, 562.

At common law on the decease of a sole trustee, if the trust still continues, the property will devolve upon his heir or personal representative, according as it is real or personal property, charged with the trust. 1 Perry on Trusts, *supra*; Lawrence v. Lawrence, 181 Ill., 248-252; DePeyster v. Ferrers, 11 Paige's Ch., 13.

If the trustee has no heirs or next of kin, the property will go to the sovereign, but the rights of the *cestui que trust* are recognized, either by statute or otherwise. 1 Perry on Trusts, Sec. 325; N. Y. Public Lands Law, Sec. 68; 1 Am. Statute Law, Sec. 1152.

Statutory Regulations. In New York on the decease of a sole trustee, the trust devolves upon the Supreme Court, which will appoint a new trustee, or take upon itself the execution of the trust. Real Property Law, Sec. 111; Personal Property

Law, Sec. 20; Matter of Waring, 99 N. Y., 114; Matter of Mayne, 98 App. Div., 171.

For rules in other states see: 1 Perry on Trusts, Sec. 341.

2. "Death of Cestui Que Trust."

In General. On the decease intestate of a *cestui que trust* having an estate of inheritance, the trust property will go to his heirs or personal representatives according as it is real or personal property. Edwards v. Edwards, 142 Ala., 267, 278.

Escheat. If the subject of the trust is real property and the *cestui que trust* leaves no heirs, it has been held in England that there is no escheat, and that the property belongs to the trustee discharged of the trust. This is upon the ground that the reason for escheat is that the lord has no tenant to whom to look to perform the feudal duties, and that where the legal title is in a trustee, he can look to the trustee. Burgess v. Wheate, 1 Wm. Blackstone, 123, Ames' Cases on Trusts, 356; Gallard v. Hawkins, 27 Ch. D., 298. In America the state takes the property, though it may not be called an escheat. Johnston v. Spicer, 107 N. Y., 185, 196. See, 11 Am. & Eng. Encyc. of Law, 2nd Ed., 323.

In case of personal property, if the *cestui que trust* leaves no one entitled to take, the property will go to the sovereign in both England and America. Middleton v. Spicer, 1 Bro. Ch. Cas., 201, Ames' Cases on Trusts, 364; Johnston v. Spicer, *supra.*

C. "By Disseisin."

If the trustee is disseissed the *cestui que trust* has no remedy against the disseissor, but may require the trustee to regain possession. This rule has come down from a similar rule applied to uses, the original reason of which was that the jurisdiction of Chancery to enforce a use was based upon confidence in the person of the feoffee to uses, and hence the use could be enforced only against the original feoffee or some one in privity with him. Ames' Cases on Trusts, 370-373.

D. "By Marriage."

1. "By Marriage of the Trustee."

At the present day if a trustee marries, the other party to the marriage acquires no beneficial interest in the trust property. Ames' Cases on Trusts, 374; Cooper v. Whitney, 3 Hill, 95, 101; King v. Bushnell, 121 Ill., 656; 1 Scribner on Dower, 2nd Ed., pp. 409-412.

2. "Marriage of Cestui Que Trust."

Dower. At common law a wife is not entitled to dower in an equitable estate of inheritance of her husband in real property, but in most jurisdictions dower has been made an incident of equitable estates of inheritance by statute. Bottomley v. Lord Fairfax, Pr. in Ch., 336, Ames' Cases on Trusts, 375, and note; D'Arcy v. Blake, 2 Sch. & Lef., 387, Id. 376; 1 Scribner on Dower, 2nd Ed., pp. 399-409; 10 Am. & Eng. Encyc. of Law, 2nd Ed., 162.

In New York the rule seems to be that a wife is dowable only of those equitable estates of inheritance of which her husband dies seized. Matter of McKay, 5 Misc. 123, 127-8; *In re* Ransom, 17 Fed. Rep., 331-334. See also, Phelps v. Phelps, 143 N. Y., 197.

Curtesy. A husband, after issue born, is entitled to curtesy in an equitable estate of inheritance of his wife in real property, even where it is for her sole and separate use. Appleton v. Rowley, L. R., 8 Eq., 139, Ames' Cases on Trusts, 381; Cushing v. Blake, 30 N. J. Eq., 689. 8 Am. & Eng. Encyc. of Law, 2nd Ed., 520.

In cases of separate use, the wife can, however, bar curtesy by a conveyance or devise of the estate. Cooper v. Mac Donald, 7 Ch. D., 288; Chapman v. Price, 83 Va., 392.

Authorities are divided as to whether the husband can be excluded from curtesy by the terms of the instrument of settlement. 8 Am. & Eng. Encyc. of Law, 2nd Ed., 522; Ames' Cases on Trusts, 383, Note 3; Shalters v. Ladd, 141 Pa. St., 349, 359.

Rights of Husband in Personal Property. The rights of the husband of a *cestui que trust* in personal property which constitutes the subject of the trust, are in general the same as his rights in property to which the wife has the legal title, except where the trust is for her sole and separate use. Miller v. Bingham, 1 Ired. Eq., 423, Ames' Cases on Trusts, 389, and notes.

E. Rights of Creditors.

1. Creditors of the Trustee.

Individual Debts. It may be stated that the trust estate is never liable for the individual debts of the trustee. Stith v. Lookabill, 71 N. C., 25, Ames Cases on Trusts, 406.

The only possibility of trust property being applied to such debts is where the trustee has so mingled it with his own property that it can no longer be followed, which subject has been already considered under the head, "The Transfer of Trust Property—By Act of the Trustee."

Debts Incurred by Trustee for Benefit of Trust Estate. It is a general rule that where the trustee incurs debts for the benefit of the trust estate, he alone is liable and the creditor has no claim on the trust property, even though the debt is a proper one, which the trustee had authority to contract, and for which on payment he might be reimbursed out of the estate. Worrall v. Harford, 8 Ves., 4, Ames' Cases on Trusts, 415; O'Brien v. Jackson, 167 N. Y., 31; McGovern v. Bennett, 109 N. W. (Mich.), 1055.

Where, however, the trustee has incurred such a debt and the trust estate has had the benefit of the consideration thereof, and the trustee has become insolvent or left the jurisdiction, relief may then be had in equity against the trust estate, the *cestui que trust* being a necessary party. Willis v. Sharp, 113 N. Y., 586; Norton v. Phelps, 54 Miss., 467, Ames' Cases on Trusts, 420; O'Brien v. Jackson, *supra* (*semble*). In such case the creditor is deemed subrogated, as it were, to the right of the trustee to be reimbursed out of the estate. Fairland v. Percy, L. R., 3 P. & D., 217, Ames' Cases on Trusts, 423.

Hence, if the trustee happens to be indebted to the estate for property unaccounted for, the creditor can have no better claim to have his debt paid out of the estate than the trustee would to be reimbursed. *In re* Johnson, 15 Ch. D., 548, Ames' Cases on Trusts, 426.

If the creator of the trust directs the trustee to carry on a business, only so much of the property becomes answerable for the debts incurred by the trustee in carrying on such business as the creator of the trust has expressly set apart for the purpose of carrying it on, and then only in case of the insolvency of the trustee. Stewart v. Robinson, 115 N. Y., 328; Fairland v. Percy, *supra*; Willis v. Sharp, *supra*; In re Johnson, *supra*.

When a trustee is authorized to make an expenditure for the protection of the estate, but there are no funds in his hands, he may procure some outsider to advance the amount necessary and charge the estate. O'Brien v. Jackson, *supra* (*semble*).

2. Creditors of Cestui Que Trust.

In General. In the absence of statute, the interest of a *cestui que trust* in the trust estate is in general subject to the claims of his creditors.

Spendthrift Trusts. It is sometimes attempted to create a trust so that creditors of the *cestui que trust* shall not be able to reach his interest in the estate, as by providing that the trustees shall pay the income from time to time to the *cestui que trust* only or only on his receipt, and not by way of anticipation. In some jurisdictions such trusts are held illegal. Brandon v. Robinson, 18 Ves., 429, Ames' Cases on Trusts, 394. But in other jurisdictions they are permitted. Broadway National Bank v. Adams, 133 Mass., 170, Ames' Cases on Trusts, 397; Mason v. R. I. Hospital Trust Co., 78 Conn., 81; Shower's Estate, 211 Pa. St., 297; Bennett v. Bennett, 217 Ill., 434. For the rules in the various states, see, 26 Am. & Eng. Encyc. of Law, 2nd Ed., pp. 138-141.

Even in jurisdictions where spendthrift trusts are not lawful,

a limitation over may be made in case of the *cestui que trust* becoming bankrupt or ceasing to be entitled to the income. Bramhall v. Ferris. 14 N. Y., 41-45.

And it may even be provided that after such an event the trustees may in their discretion apply the whole or some portion of the income to the support of the *cestui que trust*, and thus the property and income may be preserved from his creditors. *In re* Bullock, 60 L. J. R., Ch., 341, Ames' Cases on Trusts, 401.

New York Rule. In New York by statute the beneficiary of a trust under subdivision 3, of section 96, of the Real Property Law, cannot alienate his interest, nor can it be reached by his creditors in equity unless there is a surplus of income over and above what is necessary for his education and support. Real Property Law, Secs. 98 and 103.

Creditors who have exhausted their remedy at law may bring an action in equity against the trustee and *cestui que trust* to subject any surplus income to the payment of their claims. In such an action not only will any surplus already accrued be applied, but the court will fix an amount necessary for the support of the *cestui que trust* and those dependent upon him, and direct that any future income in excess of such amount be applied on the debts. Williams v. Thorn, 70 N. Y., 270; Tolles v. Wood, 16 Abb. N. C., 1, and notes. And a similar rule is applied to trusts of the same nature in personal property. Williams v. Thorn, *supra*, at p. 273.

A wife may resort to a trust fund for payment of alimony. Wetmore v. Wetmore, 149 N. Y., 520.

If the debtor be himself the creator of a trust for his own benefit, the statute does not apply, and the trust property will be subject to the claims of his creditors. Schenck v. Barnes, 156 N. Y., 316.

Since the recent amendment of section 1391 of the Code of Civil Procedure the income of the beneficiary of a trust, if in excess of $12 a week, may be reached by execution to the extent of ten per cent thereof.

X.

"THE DUTIES OF A TRUSTEE."

The most important duty of a trustee is fidelity to the trust reposed in him, to administer it in accordance with the provisions of the instrument creating it and solely for the benefit of the *cestui que trust.* He can obtain no advantage for himself, and if he does so equity will declare him a trustee of whatever he has gained, as was seen in the discussion of constructive trusts. Matter of Hirsch, 116 App. Div., 367, affd., 188 N. Y., 584; Hayes v. Hall, 188 Mass., 510; Jarrett v. Johnson, 216 Ill., 212, 219-20. Some particular duties will now be considered.

A. "To Convey the Trust-res as the Cestui Que Trust Directs."

In General. If all the beneficiaries desire to terminate the trust, and have the property conveyed to them, or sold, the question arises whether they are entitled to call upon the trustee to make a conveyance—assuming all persons interested to be of full age and capable of consenting. The English doctrine is that they are, even though such an arrangement is contrary to the provisions of the instrument creating the trust. Watts v. Turner, 1 R. & M., 634, Ames' Cases on Trusts, 453; Saunders v. Vautier, 4 Beav., 115, Id., 454. Such also appears to be the general rule in the United States. Sears v. Choate, 146 Mass., 395; Huber v. Donoghue, 49 N. J. Eq., 125, Ames' Cases on Trusts, 453, Note 1.

All the beneficiaries must unite in the request. Hoffman v. N. E. Trust Co., 187 Mass., 205. But where the shares of the beneficiaries can be separated, the trust may be terminated as to part of the trust property, if some of the beneficiaries desire it, and continued as to the balance. Williams v. Thacher, 186 Mass., 293; Welch v. Episcopal Theological School, 189 Mass., 108.

Some cases have held that the express directions of the instrument of trust are not to be disregarded, and where these require a continuance of the trust, it will not be terminated,

even at the request of all the beneficiaries. Claflin v. Claflin, 149 Mass., 19, Ames' Cases on Trusts, 455; Carpenter v. Carpenter's Trustee, 84 S. W. (Ky.), 737. See, 28 Am. & Eng. Encyc. of Law, 2nd Ed., 953.

In case of a trust merely passive no doubt can exist as to the right of a *cestui que trust* to demand a conveyance.

New York Rule. The policy of the law in New York is that the trustee shall retain the property and administer the trust until it terminates according to the terms of the instrument creating it. Hence in cases of express trusts no conveyance can be compelled. Lent v. Howard, 89 N. Y., 169, 180; Cuthbert v. Chauvet, 136 N. Y., 326; Real Property Law, Sec. 105.

By section 23 of the Personal Property Law, added in 1909, the creator of a trust in personal property is authorized to revoke the same in whole or in part upon the written consent of all persons beneficially interested therein, or in the part revoked. This section applies to trusts created before as well as after its enactment. This act has been construed in Hoskin v. Long Island Loan & Trust Co., 139 App. Div., 258, affd. on opinion below, 203 N. Y., 588.

B. "The Duty to Put Cestui Que Trust in Possession of the Trust-res."

If the trust is passive the *cestui que trust* is entitled to possession. If active his right to possession will depend in general on the terms of the trust, and if these require the trustee to hold possession, the *cestui que trust* cannot demand it. Tidd v. Lister, 5 Mad., 429, Ames' Cases on Trusts, 465; *In re* Wythes, 1893, 2 Ch., 369, 374; 28 Am. & Eng. Encyc. of Law, 2nd Ed., 1106.

In New York the *cestui que trust* of an express trust cannot require possession of the trust property. Mullins v. Mullins, 29 N. Y. Supp., 961.

C. "To Give Information."

The trustee is bound to give the *cestui que trust* information

on matters relating to the trust estate. *In re* Tillott, L. R. (1892), 1 Ch., 86, Ames' Cases on Trusts, 468, and notes.

D. "The Duty as to Investment of Trust Funds."

In General. Trustees must use with respect to trust funds, "such diligence and such prudence in the care and management, as in general, prudent men of discretion and intelligence in such matters employ in their own like affairs. This necessarily excludes * * * everything that does not take into view the nature and object of the trust." King v. Talbot, 40 N. Y., 76, Ames' Cases on Trusts, 472.

Not to Deal With Himself. The trustee must not invest trust funds in the purchase of property or securities of his own. Matter of L. I. Loan and Trust Co., 92 App. Div., 1.

Character of Securities: General Rule. In the absence of statute, it is a general rule that trust funds should be invested in government securities or first mortgages on real property, but this rule is by no means inflexible. King v. Talbot, *supra.*

Real Estate Securities. First mortgages on real estate with a sufficient margin of valuation are a proper form of investment. The mortgaged premises should generally be in the jurisdiction where the trust is being administered—that is, where the trustee is required to account. McCullough v. McCullough, 44 N. J. Eq., 313, 316. Circumstances may, however, exist which justify an investment in mortgages on foreign real estate. Ormiston v. Olcott, 84 N. Y., 339; Matter of Denton v. Sanford, 103 N. Y., 607, 612.

Second mortgages on real estate are not, in general, proper. Whitney v. Martine, 88 N. Y., 535; King v. Mackellar, 109 N. Y., 215. This rule is not inflexible, however. Higgins v. Whitson, 20 Barb., 141; Taft v. Smith, 186 Mass., 31.

Trustees should not, except under unusual circumstances, invest trust funds in the purchase of real estate. Baker v. Disbrow, 3 Redf., 348, affd., 18 Hun, 29, affd., 79 N. Y., 631.

Personal Securities. Personal securities do not as a rule form a proper investment for trust funds. Barney v. Saunders, 16 How. (U. S.), 535, 545; *In re* Craven, 43 N. J. Eq., 416.

Stock. The trustee should not invest trust funds in such manner that they will be at the risk of a business or beyond his control. Hence corporate stocks have been held to be an improper investment. King v. Talbot, *supra.* But see, *In re* Dickinson, 152 Mass., 184, Ames' Cases on Trusts, 478.

Bank Deposits. A trustee may temporarily deposit trust funds in a responsible bank or banking house, and if he uses due care and does not make the deposit in his own name, he will not be liable in case of the failure of the bank. Estate of Law, 144 Pa. St., 499. But a distinction exists between principal and income, and it may be proper to leave the latter on deposit when it would not the former. Barney v. Saunders, 16 How. (U. S.), 535, 544-546.

But if the trustee makes the deposit in his own name he will be liable in any event. *In re* Arguello, 97 Cal., 196, Ames' Cases on Trusts, 482.

Business and Speculation. A trustee must not use trust funds nor invest them to be used in business or speculation. Matter of Myers, 131 N. Y., 409; Wilmerding v. McKesson, 103 N. Y., 329; English v. McIntyre, 29 App. Div., 446; Matter of Hirsch, 116 App. Div., 367, affd., 188 N. Y., 584.

Securities in Which Trustee Finds Fund Invested. If the trustee on assuming the trust finds the fund invested in an improper manner, it is his duty, as soon as he reasonably can, to change the investments to proper ones. Matter of Myers, 131 N. Y., 409, 416; Hunt v. Gontrum, 30 At. Rep. (Md.), 620.

Investments Specified by Creator of Trust. A person creating a trust may direct the trustee to invest the estate in any manner, even in a personal loan for use in the borrower's business without security. Denike v. Harris, 84 N. Y., 89. So he may direct the fund to be used in carrying on a business. Willis v. Sharp, 113 N. Y., 586. And he may direct the trustee

to leave the fund invested as he finds it, although invested in securities not proper for a trustee to invest in. Brown v. Gellatly, L. R., 2 Ch. App., 751, Ames' Cases on Trusts, 489.

Investments in New York. The investments which trustees may make in New York are now prescribed by statute. Personal Property Law, Sec. 21; Banking Law, Sec. 146.

Failure to Invest. If the trustee fails to invest the fund when he has opportunity to do so, he will be liable for the loss incurred or, if that cannot be ascertained, for interest. Robinson v. Robinson, 1 DeG., M., & G., 247, Ames' Cases on Trusts, 495.

Gains From Improper Investments. If the trustee invests or employs the funds in an improper way, as in speculation in stocks, or in carrying on business, or otherwise, and thereby makes a profit, he cannot hold such profit for himself, but the beneficiary may elect whether to take the profit or charge the trustee with legal interest. Barney v. Saunders, 16 How. (U. S.), 535, 543; Baker v. Disbrow, 18 Hun, 29, affd., 79 N. Y., 631.

Rate of Interest. If a trustee becomes liable for interest, a question arises as to the rate, and whether or not it shall be compounded. No uniform rule can be laid down. It will depend largely on the circumstances of the case and the degree of fault on the part of the trustee. For illustrations, see, Barney v. Saunders, 16 How. (U. S.), 535, 542; Wilmerding v. McKesson, 103 N. Y., 329, 341; Matter of Myers, 131 N. Y., 409. See also, Ames' Cases on Trusts, 496, Note 8; Robinson v. Robinson, *supra.*

Depreciation of Securities. If the trustee uses due diligence and proper care in making investments, he will not be liable for depreciation of the securities in which he has lawfully invested.

E. Duty Not to Mingle Trust Property With Other Property.

It is the trustee's duty to keep the trust property separate and apart from other property, and especially not to mingle

it with property of his own. 1 Perry on Trusts, Sec. 463; Doud v. Holmes, 63 N. Y., 635; McCullough v. McCullough, 44 N. J. Eq., 313; Case v. Abeel, 1 Paige's Ch., 393, 402.

F. "The Duty of Custody of the Trust-res."

The trustee is charged with the care of the trust-res, and it is his duty to see that it is protected. He is not required, however, to keep it in his manual custody, but may deposit it in a proper place. He must keep it as a prudent man would keep his own property. Jones v. Lewis, 2 Ves., 240, Ames' Cases on Trusts, 502; McCabe v. Fowler, 84 N. Y., 314; *Ex parte* Ogle, L. R., 8 Ch. App., 711, Ames' Cases on Trusts, 504.

G. "The Duty Not to Delegate the Trust to Another."

In General. The trustee, if he accept the trust, must perform it, and cannot in general delegate it to any one else. 1 Perry on Trusts, Sec. 402.

If Trustee Assigns to Another. If the trustee assigns the trust property to another, the assignee cannot perform the trust, and the same rule applies in general in case of a devise. Cooke v. Crawford, 13 Sim., 91, Ames' Cases on Trusts, 509, and notes. And a trustee cannot appoint his successor unless authorized to do so in the instrument creating the trust. Whitehead v. Whitehead, 142 Ala., 163.

Surviving Trustee. A surviving trustee may execute a trust, without having a new trustee appointed to take the place of one deceased, unless the instrument of trust provides otherwise, but a naked power will not survive. 1 Perry on Trusts, Sec. 414; Lane v. Debenham, 11 Hare, 188, Ames' Cases on Trusts, 513; Fontain v. Ravenal, 17 How. (U. S.), 369.

Incapacity or Refusal to Act of One Trustee. In case of the incapacity of one of two or more trustees, or his refusal to act, a new trustee must be appointed or the court must take charge of the property, and each act requires the concurrence of all, except in case of public trusts, where a majority controls. 1 Perry on Trusts, Secs. 411-413; Matter of Wadsworth, 2 Barb.

Ch., 381, Ames' Cases on Trusts, 511; Swale v. Swale, 22 Beav., 584, Id., 512, and notes; Brennan v. Wilson, 71 N. Y., 502; Vohmann v. Michel, 109 App. Div., 659.

Trustee Must Exercise Powers. The trustee must exercise his powers himself, and not commit them to others. Merrill v. Farmers' Loan and Trust Co., 24 Hun, 297; Graham v. King, 50 Mo., 22, Ames' Cases on Trusts, 515.

Employment of Agents. A trustee may employ agents where it is necessary or reasonable to do so, but such agents must be proper persons—such persons as a prudent man would select in the conduct of his own affairs of like nature. 1 Perry on Trusts, 404; *Ex parte* Belchier, Ambl., 218, Ames' Cases on Trusts, 516; Speight v. Gaunt, 22 Ch. D., 727, Id., 518, and notes.

A trustee for the sale of property may with full knowledge of the facts ratify and make binding a contract obtained by an agent. Newton v. Bronson, 13 N. Y., 587, 593.

Responsibility for Acts of Co-trustees. A trustee is responsible for his own acts, and not for those of his co-trustees. Accordingly, if one of several trustees, without affirmative action on the part of the others, receives and misapplies trust funds, the others will not be liable. But if trustees unnecessarily turn over the trust funds to one of their number, and he misapplies them, the others will be liable. Bruen v. Gillet, 115 N. Y., 10. See also Purdy v. Lynch, 145 N. Y., 462. And where a trustee who is not wholly inactive permits his co-trustee to receive the trust funds with knowledge of or reasonable ground to suspect misconduct on the part of the latter and without attempt to prevent further misappropriation, he will be liable for the loss resulting from such misappropriation. Wilmerding v. McKesson, 103 N. Y., 329; Matter of Howard, 110 App. Div., 61, affd., 185 N. Y., 539.